88-2045

NO.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1988

EMPLOYERS INSURANCE OF WAUSAU, AS REPRESENTATIVE OF THOSE CERTAIN AMERICAN UNDERWRITERS SUBSCRIBING TO CERTIFICATE NO. 14880

Petitioner

VERSUS

AVONDALE SHIPYARDS, INC., OGDEN CORPORATION, SEABULK TRANSMARINE II, INC., HVIDE MARINE INTERNATIONAL, INC., AND HVIDE SHIPPING INCORPORATED

Respondents

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Guarantee Deficiency Clause of a vessel construction contract subsumes an express warranty of seaworthiness.

B. If the Guarantee Deficiency Clause does subsume the express warranty of seaworthiness set forth in the Construction Contract, whether that provision limits contractual remedies to the cost of repair or replacement of defective material or workmanship when the vessel sinks as a result of such a defect and is not recovered.

C. Whether the economic loss rule of *East River Steamship Corporation v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986) ("*East River*") bars an action in maritime tort for the negligence of a party, other than the shipbuilder, who had contracted to provide professional services in connection with the construction of a vessel.

D. Whether the defense afforded by *East River* can be asserted for the first time on appeal when the issue of any failure of the Complaint to state a claim upon which relief could be granted was not raised prior to the conclusion of trial on the merits.

LIST OF PARTIES

Pursuant to Rule 21.1(b) of the Supreme Court of the United States the American Underwriters certify that the following parties are interested in the outcome of this proceeding:

Aachener Ruck
Aachener Ruckversicherungs Gesellschaft
Adams & Reese
Ago Schadeverz Mij
Allianz Insurance Co. Ltd.
Allianz International Insurance Co. Ltd.
Alpina Versicherungs Zurich
American Marine Underwriters, Inc.
Americas Insurance Company
Andrew Weir
Andrew Weir Insce Co. Ltd.
Andrew Weir Insco Ltd. SB T A/C.
Ass. Mij de Scoen Provincien Assce
Assicurazione Generali S. p A.
Atlantic Insurance Co.
Atlantic Mutual Insurance Co.
Atlas Assurance Co. Ltd. T A/C.
Avondale Shipyards, Inc.
Avondale Industries, Inc.
Baloise Insce Co., Ltd.
Baltica Scandinavian Insurance Company (UK) Ltd.
Bavarian Re
Bayerische Ruckversicherung A.G.
Brauer & Heye
British Law
British Reserve Ins. Co. Ltd.
Burlingham, Underwood & Lord
Cadwalader, Wickersham & Taft
Chaffe, McCall, Phillips, Tolar & Sarpy
Chiyoda Fire & Marine Insurance Company
Commercial Union Assurance Co. Ltd.
Compagnie D'Assce M'imes Aeriennes et Terrestres
Cornhill Insurance Co. Ltd. SV7
Cornhill Insurance Company
Danish Marine Insurance Company Ltd.
Donald H. Miller, Inc.
Drake Insurance Co. Ltd.
Employers Insurance of Wausau
English & American Ins. Co. Ltd. M 2 A/C
English & American Ins. Co. M1 A/C
English & American Insurance Co. Ltd. T A/C

Ennia Schadeverz
Excess Insce
Federal Insurance Co. of New Jersey, New York
Forsakrings-Akticbolaget 'Securitas', Lund
Frankona Ruck
Frankona Ruckversicherungs Aktiengesellschaft
Fred S. James & Co. of New York, Inc.
Gelpi, Sullivan, Carroll & LaBorde
General Electric Credit Corp. of Georgia
Gerling Global
Gerling Globale Ruckversicherung Aktiengesellschaft
Gothaer Trans
Gothaer Transport Und Ruckversicherung Aktiengesellschaft
Hannover Int. Insurance (NED) N.V.
Hansa Marine Insurance Co. (UK) Ltd.
Hansa Marine Insurance Company (UK) Ltd. S. GP.
Hartford National Bank and Trust Co.
Hill, Betts & Nash
Hudig-Langeveldt
Hvide Marine International, Inc.
Hvide Shipping, Incorporated
Iduna Allgeme
Iduna Allgemeine Versicherung A. G.
Inland Underwriters Insurance Company
Insce Corporation of Ireland Ltd. L A/C.
Insce Corporation Ltd. L A/C
Insurance Corporation of Ireland Ltd.
Insurance Corporation of Ireland Ltd. L A/C.
Iron Trades Ltd.
Iron Trades Mutual Insurance Co. Ltd.
Jauchn Hubener
J. J. Henry Co., Inc.
Jones, Walker, Waechter, Poitevent, Carrere & Denegre
KOA
Kolnische Ruckversicherungs Gesellschaft
La Preservatrice C. A. D' Assce - Aird E
La Reunion Francaise Soc Anon D'Assces et Des Reass PL A/C.
Liskow & Lewis
Lloyd's Syndicate Nos. 868, 505 127, 700, 764, 908,145, 209, 288, 653, 728, 448, 449, 447, 206, 725
London & Hull Maritime Insurance Co. Ltd.
Lugenbuhl, Burke, Wheaton, Peck & Rankin
Malvern Insurance Co. Ltd.
Malvern Insurance Ltd.
Malverns Insurance
Minster Insce Co. Ltd.
Minster Insce Co. Ltd. 1 A/C.
M.U. Cambridge Ins. Co. (UK) Ltd.
National Nederlanden Schadeverz
Nordstern
Nordstern Allgemeine Versicherungs Aktiengesellschaft
Northern Assce T A/C
Norwich Union CTY Ltd. Trust A/C

Norwich Union Fire Ins. Socty Ltd. Trust A/C.
Norwitch Union Fire Insce Socty Ltd. Trust Z A/C.
Occidental Chemical Agricultural Products, Inc.
Occidental Chemical Corporation
Occidential Petroleum Corporation
Ocean Marine
Ocean Marine Insurance Co. Ltd.
Ogden Corporation
Onsce Co. of (UK) Ltd.
Orion Insurance Co. Ltd. T A/C
Orion Insurance Co. Ltd. T A/C, the
Phelps, Dunbar, Marks, Claverie & Sims
Polaris Norske Sjo Insurance Company, Ltd.N A/C
Price Forbes
Provincial Insce Co. Ltd.
Prudential Assce Co. Ltd. Trust A/C
Prudential Trust
QBE Insurance Ltd.
Reed & Brown, Inc. (now CRB Management, Inc.)
River Thames Insurance Co. Ltd.
Road Transport Insurance Company Ltd.
Rochdale Insurance Company —
Rotterdamse Assurantiekas
Royal Insce
Royal Insurance Co. Ltd.
Seabulk Tankers, Ltd.
Seaulk Transmarine I, Inc.
Seabulk Transmarine II, Inc.
Seabulk Transmarine III, Inc.
Sedgwick Chartered Hong Kong Ltd.
Sedgwick Marine Ltd.
Seine et Rhone Oceanide Reunies, Paris
Sessions, Fishman, Rosenson, Boisfontaine, Nathan & Winn
Seven Provinces Insurance Co. Ltd.
Shea & Gouid
Societe Commerciale de Reassurance
Southern Marine & Aviation Underwriters, Inc.
Soverign General Insurance Co. Ltd. SXI
Sovereign Marine & General Insurance Co. Ltd.
Sphere Insce Co. Ltd.
Sphere Insurance Co. Ltd.
Sphere Insurance Co. Ltd. B ACC.
Sphere Insurance Company Ltd. B A/C
Standard Chartered Insurance Brokers (Singapore) Ltd.
Stone, Pigman, Walther, Wittmann & Hutchinson

Storebrand Insurance Co. (UK) Ltd.
Storebrand Ltd.
Suwannee River Chartering, Inc.
Suwannee River Lines, Inc.
Suwannee River Phosophate Lines, Inc.
Suwannee River SPA Lines, Inc.
Switzerland General Ins. Co. (London) Ltd.
Taisho M. Insurance Co. (UK) Ltd.
Taisho Marine & Fire Insurance Co. (UK) Ltd.
The Drake Insce Co. Ltd.
The London Assurance
The Netherlands Insurance Co.
The Nippon Fire & Marine Insurance Co. (UK) Ltd.
The Threadneedle Insurance Co. Ltd.
The Tokio Marine & Fire Insurance Co. (UK) Ltd.
The Tokio Reinsurance Co. (UK) Ltd.
The Yasuda Fire & Marine Ins. Co. (UK) Ltd.
Thuringia Ver
Thuringia Versicherungs Aktiengesellschaft
Tollenaar and Welsener
Travelers Insurance Company
Unigard Mutual Insurance Co.
Unione Italiana Reinsurance of America
United Americas Insurance Co.
United States Fidelity and Guaranty Co.
Vesta Bergen
Vesta (UK) Insurance Company Ltd.
VMW Industries, Inc. (formerly Victoria Machine Works, Inc.)
Yasuda Fire & Marine Insurance Co. (UK) Ltd. T A/C

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REPORTS OF OPINIONS DELIVERED BELOW

The opinion of the Appellate Court is reported as *Employers Insurance of Wausau v. Suwannee River SPA Lines, Inc.*, 866 F.2d 752, reh. den., 871 F.2d 121 (5th Cir. 1989). The opinion of the District Court is unreported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) on the ground that the decision of the Court of Appeals for the Fifth Circuit conflicts with the statutes of the State of New York and with the decisions of its Courts on a matter of state law at issue in this proceeding. In addition, the decision of the Appellate Court addresses an important question of federal law which has not been, but which should be, decided by this Court. Finally, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by permitting, over the objection of Petitioner, the assertion of a defense that had been waived in the District Court as to call for an exercise of this Court's power of supervision. As Judgment was rendered and entered by the Court of Appeals on February 13, 1989, and Petitions for Panel Rehearing and for Rehearing En Banc were denied on March 20, 1989, this Petition for Certiorari complies with the requirements of 28 U.S.C. §2101(c).

STATUTORY PROVISIONS INVOLVED

A. New York UCC §2-316(1) (McKinney 1964)
§2-316. Exclusion or Modification of Warranties

> (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be con-

strued whenever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

B. New York UCC §2-317 (McKinney 1964)

§2-317. Cumulation and Conflict of Warranties Express or Implied

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

C. New York UCC §2-719 (McKinney 1964)

§2-719. Contractual Modification or Limitation of Remedy

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those

provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it in the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its esssential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

D. Federal R. Civ. P. 12(h) (2)

Rule 12. Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on the Pleadings.

(h) Waiver or preservation of certain defenses.

***

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by Motion for Judg-

ment on the pleadings, or at trial on the merits.

STATEMENT OF THE CASE

During the early 1970's, Occidental Petroleum Corporation ("Occidental") began to manufacture superphosphoric acid for export to the Soviet Union. As part of this business venture, Occidental required special vessels to transport this substance across the Atlantic Ocean to Russian ports in the Black Sea. Among various options, Occidental chose to construct three identical catug ITBs. The OXY PRODUCER and the Barge OXY 4102 were the second of this series of vessels.

A catug ITB is composed of a tug and a barge unit "mated" through an interconnection system and designed to behave as if it were one vessel. The tug has two catamaran hulls connected by a crossover structure. A ledge protrudes from the lower portion of each catamaran hull. The after end of the barge is tapered to fit into the "wedge" formed by the hulls of the tug on each side, the tug crossover, and the ledges protruding from the hulls. Strips of greenheart wood, a hardwood with frequent maritime applications, are placed along the upper surfaces of the after end of the barge and the ledges protruding from the catamaran hulls. The contact of these greenheart surfaces with the steel underside of the tug crossover and with the steel hull of the barge, respectively, generates friction which, together with other portions of the interconnection system, keep the tug and the barge mated during a voyage.

The interconnection system has additional features. First, there are four bumper pads located between the tug and barge hulls. These consist of rubber mats preloaded to 800 tons of compression sandwiched between steel base plates. Two of these pads were welded to the after end of the barge, one on each side. The other two pads were welded to the forward inside surfaces of the catamaran hulls.

These pads were designed to prevent any transverse, or side-to-side, movement of the vessel after mating and during operation at sea. Second, two link arms connect the crossover of the tug with the deck of the barge. The link arms were designed to pull the tug and the barge together in order to supplement the fit.

Several parties were involved in the construction of the tug, the barge, and the interconnection system. As owner of the catug design, and having operated other catug ITB's, Seabulk Transmarine II, Inc., Hvide Marine International, Inc. and Hvide Shipping, Inc. (hereinafter collectively referred to as "Hvide") contracted to supervise the design and construction of the tug, barge, and interconnection units and warranted that the vessels, when mated, would be seaworthy.

J. J. Henry Co., Inc. ("J. J. Henry") contracted with Occidental to prepare the plans and specifications for each vessel, and to review the Contractor's working drawings. J. J. Henry expressly warranted that if its plans were followed, the vessels, when mated, would be seaworthy.

The actual construction of both the OXY PRODUCER and the Barge OXY 4102 was performed by Avondale Shipyards in New Orleans, Louisiana. Avondale entered into a contract with Occidental for the construction of these vessels. In the construction contract, Avondale expressly warranted that the OXY PRODUCER and the Barge OXY 4102 would be constructed in accordance with the plans and specifications, and that the vessels would be seaworthy. Avondale's performance was guaranteed by Ogden Corporation.

The final participant in the construction of the vessels, insofar as this litigation is concerned, was Victoria Machine Works, Inc. ("Victoria Machine"). It contracted

with Avondale to design and manufacture the bumper pads used to prevent transverse motion between the vessels after mating.

The OXY PRODUCER and her barge, the OXY 4102, made one successful round-trip to the Soviet Union. However, on the second voyage, rough weather was encountered during which the system connecting the vessels deteriorated. The relative movement between the tug and the barge, generated after the deterioration of the interconnection system, opened holes in the catamaran hulls and ultimately resulted in the sinking and total loss of the OXY PRODUCER, the tug unit of the ITB, on Septermber 20, 1981. Although the barge was salvaged, it was designed to be used *only* with the OXY PRODUCER, and was rendered essentially worthless by the casualty. Accordingly, it was deemed to be a total loss.

As found by both the Trial Court and the Court of Appeals, the deterioration of the interconnection system was caused by the improper mating of the units of ITB. The tug, its barge, and the interconnection system, if designed and constructed properly, should have been able to weather the conditions encountered easily. However, the OXY PRODUCER was delivered with virtually no greenheart contact between the tug and the barge. Rather than the 85 to 90% greenheart contact required by the specifications, the tug rested on only a few high spots of the barge greenheart surfaces, achieving contact of just ten percent. Contact at the specified range was necessary to avoid rapid greenheart wear and a sudden decompression of the linkage system.

As a result of the loss, Occidental and its insurers commenced this action in the United States District Court

for the Eastern District of Louisiana against J. J. Henry, Avondale, Ogden, and Hvide alleging claims sounding in maritime tort and contract. The plaintiffs claimed that each defendant breached its respective contractual obligations and that each defendant negligently performed those obligations. Plaintiffs also filed suit, in tort, against Victoria Machine, alleging that it negligently designed the bumper pads placed on the vessels. Jurisdiction in the District Court was based on Admiralty and Maritime Jurisdiction, 28 U.S.C. §1333, with jurisdiction over the state-law contractual claims grounded in the Court's pendant and ancillary jurisdiction.

After the conclusion of the liability portion of a bifurcated trial, the Trial Court rendered judgment dismissing all claims against defendants Victoria Machine and J.J. Henry, holding the remaining defendants, Avondale, Ogden Corporation (hereinafter collectively referred to as "Avondale"), and Hvide, liable for the loss of the OXY PRODUCER. The plaintiffs denominated as Occidental and the "British Underwriters" appealed the dismissal of Victoria Machine Works and J. J. Henry to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. 1292(a)(3).[1] Defendants Avondale and Hvide also filed an interlocutory appeal of the findings of liability against them.[2] These appeals were consolidated

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[1] Petitioner, designated as "American Underwriters", did not appeal interlocutorily. The American Underwriters were, and are, acting separately because their portion of the hull claim was paid under a reservation of rights. A standstill agreement has been executed by the American Underwriters, Occidental and Hvide, reserving actions among those parties, if any, until the completion of appeals in this matter.

[2] American Underwriters did appear as Appellee in this appeal.

by the Fifth Circuit on July 17, 1986.

On September 16, 1986, Avondale, Hvide and other defendants filed Motions to Dismiss the consolidated appeals for lack of subject matter jurisdiction. These motions were denied by the Fifth Circuit on November 5, 1986, and the case was remanded to the District Court for reconsideration of its decision on liability in light of this Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed 2d 865 (1986) ("*East River*").

After receiving briefs and hearing argument on the issue, the District Court issued an opinion on remand on July 15, 1987 in which it held that *East River* was inapplicable to a contract to perform services. Avondale and Hvide appealed from this opinion, and all appeals were consolidated in the Court of Appeals.

In its decision, the Fifth Circuit correctly held that there was admiralty and maritime jurisdiction over this proceeding, and that pendant jurisdiction could be exercised over the contractual claims brought under New York law. However, although it agreed with the Trial Court that the OXY PRODUCER was delivered in a defectively mated condition which rendered the vessel unseaworthy, the Court deprived Occidental and its underwriters of all remedies under the Construction Contract and their remedies against Hvide in tort. The Court's "construction" of the Guarantee Deficiency Clause of the Construction Contract in effect converted a clause designed to provide an optional benefit *to Occidental* into a limitation of remedies which deprived it of the substantial value of its bargain. Furthermore, the Court allowed Hvide to assert a defense it had waived in the Trial Court, and, through its improper extension of the economic loss rule announced in *East River*, incorrectly dismissed plaintiffs' tort claims

for failure to state a claim. It is upon these issues that the American Underwriters petition this Court for certiorari.

ARGUMENT

A. The Guarantee Deficiency Clause of the Vessel Construction Contract Does Not Subsume Avondale's Express Warranty of Seaworthiness.

After construing the Construction Contract and finding that an express warranty of seaworthiness was incorporated into the contract from the vessel specifications, the Appellate Court held that the parties intended this warranty to be "subsumed" by the Guarantee Deficiency Clause. *Employers Insurance,* 866 F.2d at 775. As a result, it limited plaintiffs to the recovery of the cost of the repair or replacement of the interconnection system of the ITB. This holding is contrary to New York law, the law stipulated by the parties to govern their transaction.

The Guarantee Deficiency Clause, provides:

> "notwithstanding any approval of contract drawings, inspection or failure to reject by the Purchaser. . .pursuant to this Construction Contract, if at any time during the Guarantee Period there shall appear or be discovered any Guarantee Deficiency, such Guarantee Deficiency shall be made good, at the contractor's expense, to the requirements of the Vessel Plans and Specifications and this Construction Contract. (Construction Contract Article XVIII(a)).

A "Guarantee Deficiency" is defined as any weakness, failure or deterioration of workmanship or material, or the failure of any equipment, machinery or material to function

as prescribed in the Vessel Plans and Specifications. *Id.*, Article I(n). Under this provision, which on its face appears to contemplate only defects in vessel components, Avondale is obligated to repair a condition or replace any defective part which gives rise to a Guarantee Deficiency if the clause is invoked. *Id.*, Article XVIII(a). However, the clause cannot be read to subsume Avondale's warranty of seaworthiness.

In interpreting a contract, "that interpretation is favored which will make every part of the contract effective." *National Equipment Rental, Ltd. v. Reagin*, 338 F.2d 759 (2d Cir. 1964), *Bloor v. Falstaff Brewing Corp.*, 454 F.Supp. 258, 266 (S.D.N.Y. 1978), *aff'd*, 601 F.2d 609 (2d Cir. 1979), *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 308 N.Y. 342, 347, 126 N.E. 2d 271, 273 (N.Y. 1955). When two seemingly conflicting contract provisions can reasonably be reconciled, a court is *required* to do so and to give both effect. This applies with equal force when one document incorporates the terms of another, as the Vessel Construction Contract did the warranty of seaworthiness here. *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390 (2nd Cir. 1985), *National Conversion Corp. v. Cedar Building Corp.*, 23 N.Y. 2d 621, 298 N.Y.S. 2d 499, 246 N.E. 2d 351 (N.Y. 1969), 3 *Corbin on Contracts* Section 547, at 172-3 (1960).

With these principles in mind, it becomes clear that the Guarantee Deficiency Clause is nothing more than a "guarantee" of workmanship and material; rather than excluding or limiting plaintiffs' remedies for breach of the contract and the warranty of seaworthiness, the provision imposes a *separate* and *additional* obligation on Avondale to repair or replace defective material or workmanship for one year after the delivery and acceptance of the vessel. As a guarantee, the provision does not provide plaintiffs' ex-

clusive remedy under the construction contract. Contrary to the Fifth Circuit's ruling, New York law does not interpret these clauses to subsume or extinguish the express warranties set forth in the contract. *Schulman Investment Company v. Olin Corp.*, 477 F.Supp. 623, 628 (S.D.N.Y. 1979), *Carrols Equities Corp. v. Villnave*, 57 A.D. 2d 1044, 395 N.Y.S. 2d 800 (4th Dept. 1977), *appeal den.*, 42 N.Y. 2d 810, 399 N.Y.S. 2d 1026, 369 N.E. 2d 775 (N.Y. 1977), *Town of Tonawanda v. Stapell, Mumm & Beals*, 240 A.D. 472, 270 N.Y.S. 377 (N.Y.A.D. 4 Dept. 1934), *aff'd*, 265 N.Y. 630, 193 N.E. 419 (N.Y. 1934), see also *Complaint of American Export Lines, Inc.*, 620 F. Supp. 490, 516 (S.D.N.Y. 1985). This interpretation is also prevalent in other jurisdictions. *See e.g., Baker-Crow Construction Company v. Hames Electric, Inc.*, 566 P.2d 153 (OK App., Div. 1, 1976). Thus, rather than limit Avondale's liability for breach of warranty, the clause gives Occidental the option of requiring Avondale to repair the defect. This conclusion is also compelled by the Uniform Commercial Code, upon which the Fifth Circuit relied in making its decision.

Although the code permits the seller to limit the purchaser's remedies to repair or replacement of nonconforming goods or parts, the limitation "is optional unless the remedy is *expressly agreed to be exclusive*, in which case it is the sole remedy". "Warranties, whether express or implied *shall be construed* as consistent with each other and *as cumulative ...*" N.Y. U.C.C. Sections 2-719(1)(b), 2-317 (McKinney 1964), *See e.g., Curtis v. Murphy Elevator Company*, 407 F. Supp. 940 (E.D. Tenn. 1976). These provisions create a presumption that clauses setting forth remedies are *cumulative* rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this intention must be clearly expressed. *Stream v. Sportscar Salon, Ltd.*, 91 Misc. 2d 99, 397 N.Y.S. 2d 677 (N.Y. City Civ. Ct. 1977). Nowhere in the Guarantee Deficiency

Clause, or in the Construction Contract generally, is it stated that repair or replacement of defective material or workmanship is the exclusive *remedy* under the contract.

The only provision of the Construction Contract which mentions exclusivity is paragraph (g) of Article XVIII. That paragraph provides:

> (g) THE WARRANTIES AND GUARANTEES SET FORTH IN ARTICLE VIII RELATING TO SPEED, FUEL CONSUMPTION, SPA CARRYING CAPACITY AND DEADWEIGHT TONNAGE, IN THIS ARTICLE XVIII, RELATING TO ANY GUARANTEE DEFICIENCY AND IN ARTICLE XXXVIII RELATING TO DESIGN RESPONSIBILITY FOR THE BARGE, ARE EXCLUSIVE AND ARE IN LIEU OF ALL IMPLIED WARRANTIES (INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND WORKMANLIKE SERVICES).

This provision, being a disclaimer or limitation of warranties, must be strictly construed. *Computerized Radiological Services, Inc. v. Syntex Corp.*, 595 F.Supp. 1495 (E.D.N.Y. 1984), *aff'd in part, rev'd in part on other grounds*, 786 F.2d 82 (2nd Cir. 1986), *Arnold v. New City Condominiums Corp.*, 78 A.D. 2d 882, 884, 433 N.Y.S. 2d 196 (N.Y.A.D. 2 Dept., 1980), *appeal dismissed*, 53 N.Y. 2d 823, 439 N.Y.S. 2d 922, 422 N.E. 2d 582 (N.Y. 1981) *appeal dismissed*, 53 N.Y. 2d 604, 439 N.Y.S. 2d 1028, 422 N.E.2d 583 (N.Y. 1981).

> Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each

> other, but...negation or limitation is inoperative to the extent that such construction is unreasonable. N.Y. U.C.C. Section 2-316(1) (McKinney 1964)

As the Trial Court correctly found, Article XVIII(g) at most disclaimed all implied warranties, and does not, through its language of exclusivity, extinguish the express warranty of seaworthiness. An attempt both to warrant and to refuse to warrant goods creates an ambiguity which can only be resolved by making one term yield to the other. Section 2-316 of the Uniform Commercial Code provides that warranty language prevails over the disclaimer, if the two cannot be reasonably reconciled. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y. 2d 398, 405, 297 N.Y.S. 2d 108, 113, 244 N.E. 2d. 685, 689 (N.Y. 1968).

Construing a beneficial clause, such as the Guarantee, to extinguish the express warranty of seaworthiness is patently unreasonable when that clause, on its face, deals not with the overall functioning of the vessel, but instead with defects in its individual components. Nothing is more fundamental to a shipbuilding contract than that the vessel constructed will float. Avondale expressly warranted that the OXY PRODUCER would be seaworthy and suitable for its intended purpose, yet it sank on its second voyage. Why would the parties bother to set forth an express warranty of seaworthiness in the Contract if it were subsumed in the Guarantee Deficiency Clause? Furthemore, the word "exclusive", as used in Article XVIII(g) of the contract, is clearly used only to confine the list of warranties that were given in addition to the warranty of seaworthiness. It in no way purports to limit the remedy for the breach of any warranty to the cost of repair or replacement of the condition giving rise to the breach.

Occidential did not build the OXY PRODUCER as a novel experiment to push the limits of naval architecture as suggested by the Fifth Circuit. *Employers Insurance*, 866 F.2d at 779. The record is clear that Occidental accepted Hvide's design of the catug ITB as a *proven*, economical system to deliver its products to market. There is absolutely no evidence that Occidental contracted to assume the risk that the OXY PRODUCER would sink like a rock due to defects in its construction.

Contrary to New York law, the Court has converted an optional benefit under the Contract running in favor of Occidental into a limitation of Occidental's warranty rights. It has rewritten the contract negotiated by the parties through the guise of "interpretation." This it cannot do. *Laba v. Carey*, 29 N.Y. 2d 302, 327 N.Y.S. 2d 613, 618, 277 N.E. 2d 641 (1971), *reh. den.*, 30 N.Y. 2d 694, 332 N.Y.S. 2d 1025, 283 N.E.2d 432 (N.Y. 1972), *Seifert, Hirshorn & Parkman, Inc. v. Insurance Company of North America*, 36 A.D. 2d 506, 321 N.Y.S. 2d 815, 816 (1st Dept. 1971). Certiorari should be granted on this issue, and the Appellate Court's redrafting of the Contract reversed.

B. The Repair or Replace Remedy Set Forth in the Guarantee Deficiency Clause Has Failed of Its Essential Purpose and Does Not Limit Recovery to the Cost of Repair or Replacement of Defective Material or Workmanship.

Even if the Guarantee Deficiency Clause could be construed as the exclusive remedy for loss of the vessel under the Construction Contract, that provision would not preclude plaintiffs from recovering damages. Not only does the repair or replacement remedy fail of its essential purpose, the provision the Court construed as a limitation of Occidental's remedies to the cost of repair of the defects

in the vessel is linked with the repair or replace remedy and also falls. A contrary construction impermissibly deprives Occidental of the substantial value of its bargain.

Section 2-719(2) of the UCC provides that "where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." N.Y. U.C.C. Section 2-719(2) (McKinney 1964). This section applies whenever an exclusive remedy, which may have appeared fair and reasonable at the inception of the contract, operates to deprive a party of the substantial benefit of his bargain as a result of later circumstances. *Cayuga Harvester, Inc. v. Allis-Chalmers Corp.*, 95 A.D. 2d 5, 465 N.Y.S. 2d 606, 611 (A.D. 4 Dept. 1983).

Although repair or replacement remedies are deemed to fail most frequently in situations when the seller is unable to put the goods in warranted condition after repeated attempts to do so, the remedy also fails in situations when the goods were destroyed as the result of their defects. 1 White & Summers, *Uniform Commercial Code, Practitioners Edition* (3d Ed. 1988), Para. 12-10 at 602.

> The purpose of a repair-or-replace contracted remedy is to give the buyer what he bargained for, namely goods that measure up to the contract... This purpose is defeated if the goods are destroyed by their own flaws so that repair or replacement are totally unsatisfactory. For example, suppose the seller expressly warrants the quality of brake linings he has sold to the buyer; that the contract also contains a provision that if the brake linings prove defective the buyer's exclusive remedy is to have them repaired or replaced free of charge by the seller; (and) that as a result of the failure of the brake linings, the buyer's car is totally destroyed in a collision...

> Under these circumstances, the repair-or replace remedy fails of its essential purpose, because it makes no sense to repair or replace the brake linings of a demolished car. Hawkland, *UCC Series* Section 2-719:03.

It appears that this approach is followed in every jurisdiction which has addressed the issue, and, when the product is destroyed due to latent flaws, the repair-or-replace remedy has been held to have failed of its essential purpose. The purchaser is then permitted to resort to his other remedies under the Code. *Rudd Const. Equip. Co., Inc. v. Clark Equip. Co.*, 735 F.2d 974 (6th Cir. 1984); *Comind, Companhia de Seguros v. Sikorsky Aircraft*, 116 F.R.D. 397 (D. Conn. 1987); *Russo v. Hilltop Lincoln-Mercury, Inc.*, 479 S.W. 2d 211 (Mo. App. 1972); *Ford Motor Co. v. Reid*, 250 Ark. 176, 465 S.W. 2d 80 (Ark. 1971); *State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc.*, 110 N.W. 2d 449 (Iowa 1961). This result is consistent with New York law. *Cayuga*, 465 N.Y.S. 2d at 611 (the total inability to repair can also deprive the buyer of the benefit of his purchase).

Because the OXY PRODUCER sank in the Atlantic Ocean beyond salvage and repair, the repair and replace remedy has failed of its essential purpose. Occidential bargained for a seaworthy vessel to transport its products, a bargain the repair or replacement remedy can no longer achieve.

The Guarantee Deficiency Clause also provides that:

> The Contractor shall not be liable to the Purchaser for any damages to the vessel or its equipment or cargo or other property of such Purchaser or for consequential damages of Purchaser *arising out of any such Guarantee Deficiency*, except that in the event of any Guarantee Deficien-

> cy in any item of machinery or equipment furnished by the Contractor, the Contractor shall be liable not only for the cost of correcting or repairing such Guarantee Deficiency, but also shall be liable for the cost of correcting or repairing the damage to the item of machinery or equipment on the vessel caused by such Guarantee Deficiency. Construction Contract, Article XVIII(a),

Relying on *American Electric Power Company, Inc. v. Westinghouse Electric Corporation*, 418 F. Supp. 435 (S.D.N.Y. 1976), the Court held that this portion of the Guarantee Deficiency Clause would survive the failure of the repair or replace warranty stated earlier in the clause. This conclusion is belied by the Courts *own authority.*

American Electric involved a defective generator sold to the utility by Westinghouse. The contract of sale contained an exclusive repair or replace remedy and *a separate provision* limiting consequential damages. Although repeated attempts to bring the generator up to warranted capacity had been made, the generator failed to operate properly, and Westinghouse refused to provide a replacement. The court held that *because the limitation* provision of the contract *was separate and independent* from the repair and replace warranty, and *because the utility was left with an adequate remedy* under the contract, through recovery of the purchase price of the generator, the limitation could stand in spite of the failure of the repair or replace warranty. *American Electric*, 418 F. Supp. at 458-9. Contrary to the ruling of the Fifth Circuit, the conditions upon which this holding was based are not present here. The limitation provision does not survive the failure of the repair or replace remedy.

Unlike the situation in *American Electric*, the limitation in this case *is a part of the very provision that has*

failed, the Guarantee Deficiency Clause. By its very terms, the limitation only applies to the consequences caused by a Guarantee Deficiency, and is intimately tied to the repair or replace warranty. Only when the limitation is separate, and can stand or fall independently, does it survive the failure of the exclusive remedy. *American Electric,* 418 F. Supp. at 458; *County Asphalt, Inc. v. Lewis Welding & Engineering Corp.*, 323 F. Supp. 1300, 1309 (S.D.N.Y. 1970), *aff'd* 444 F.2d 372 (2d Cir. 1971), *cert. den.*, 404 U.S. 939, 92 S.Ct. 172, 30 L.Ed. 2d 252 (1971). Because the limitation is a part of the Guarantee Deficiency Clause, and is linked to and dependant on the repair or replacement remedy it provides, any failure of the repair or replace remedy also destroys the limitation.

Furthermore, although parties to a contract are given broad latitude to fashion their own remedies for breach of contract, the very essence of a sales contract is that at least minimum adequate remedies be available for its breach. If parties intend to conclude a contract for sale, they must accept the legal consequence that there be at least a fair quantum of remedy. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y. 2d 398, 297 N.Y.S. 2d 108, 244 N.Ed. 2d 685 (N.Y. 1968). "Where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions" of the Code. *American Electric,* 418 F. Supp. at 458, quoting *Official Comment* 1 to §2-719 of the UCC.

In *American Electric* the contract provided for a *damage recovery* distinct from the warranty to repair or replace. If the generator could not be repaired by Westinghouse, American Electric could recover the *full purchase price* of the generator as damages, plus any addi-

tional direct damages in excess of this amount, since the contract excluded only consequential loss. The Court considered this factor most important in making its decision. *American Electric,* 418 F. Supp. at 458-9.

Here, however, the Appellate Court appears to read the provision as limiting plaintiffs to the recovery of only the *cost* of repairs even if the repair or replace remedy has failed. Thus, under this interpretation of the contract, as stated by the Trial Court, if it could be shown that the sinking resulted from the failure of a $1.00 part, Avondale would staisfy its obligation by tendering to Occidental $1.00, while leaving Occidental to absorb a loss, for the vessel alone, in excess of $30 million. It bears repeating that Occidental bargained only for an economical transportation system to carry its products to the Soviet Union. To accomplish this end it chose a proven design that had been utilized by Hvide successfully for years. To hold that it limited its remedy to the cost of repair of any defects, and assumed the risk that the vessel would not float, is, as characterized by the District Court, an absurd result. Such a conclusion deprives Occidental of the substantial value of its bargain, the purchase of an economical, but reliable vessel, and cannot stand.

C. The Rule of *East River* Should Not Be Extended To Bar Maritime Tort Claims Against Hvide, a Party Which Contracted To Provide Professional Services in Connection with the Design and Construction of the Vessel.

Prior to this Court's ruling in *East River,* it was feared that the law of contract "would drown in a sea of tort." See G. Gilmore, *The Death of Contract* 87-95(1974), *East River,* 106 S. Ct. at 2300, However, since that decision was handed down, and the floodgates opened, the sea of tort has been rapidly draining away. Tort claims have been

barred, even where maritime jurisdiction has been found, against the supplier of component parts of a vessel, with whom the vessel owner was not in privity of contract, *See Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987), *cert. den.*, —U.S.—, 108 S.Ct. 1472, 99 L.Ed. 2d 701 (1988), and now against the furnisher of supervisory services in connection with the construction of a vessel. This Court should now step in to regulate the flow from the floodgates it has opened, by defining, as it did with tort claims, the extent to which contract law and tort law will apply.

The issue raised in this case is whether the economic loss rule applies to contracts for professional services, rendered in connection with the manufacture of a product, by a party other than the manufacturer. As noted by the Appellate Court, this is an issue of first impression.[3]

The cause of action for negligent performance of professional services has been described as follows:

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[3] The Appellate Court cited both *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942 (11th Cir. 1982) and *PPG Industries, Inc. v. Sundstrand Crop.*, 681 F. Supp. 287 (W.D. Pa. 1988) as extending the economic loss rule to contracts for professional services. However, it appears that in both cases the party performing the services was also engaged in the manufacture of the product. In *Flintkote*, Dravo actually performed much of the construction of the cargo unloader, and provided supervisory and inspection services only with respect to its subcontractors. While the situation in *PPG Industries* is far from clear, PPG did issue purchase orders *for the manufacture* and supply of the product to Sundstrand, which ultimately filled the order. *PPG Industries*, 681 F. Supp. at 288. To the extent these cases involve supervisory or professional services performed by the manufacturer, they go no farther than this Court's holding in *East River*, where the manufacturer supervised the installation of its vessel propulsion system.

> Where a person contracts to do certain work he is charged with the common law duty of exercising reasonable care and skill in the performance of the work required to be done by the contract. It is the breach of the duty imposed by law, and not of the contract obligation, whch constitutes the tort. *Consolidated Edison Company of New York, Inc. v. Westinghouse Electric Corporation,* 567 F. Supp. 358, 364 (S.D.N.Y. 1983).

Unlike a contract for the sale of goods, contracts for services are not governed by the UCC. While the implied warranties provided by the UCC provide an adequate replacement for the imposition of a duty in tort when the defective product injures itself, no such protection from economic loss exists for the purchaser of services, absent a duty of proper performance. *Employers Insurance,* 866 F.2d at 764. Because the work of professionals often cannot be precisely defined by contract, special non-contractual duties enforced by tort law make up for the lack of sophistication of the parties who seek them. *PPG Industries,* 681 F. Supp. at 290.

Simply because professional services are sought in a commercial context does not mean that the parties are sufficiently knowledgeable concerning the results they seek to obtain from those services to arrive at a fairly bargained allocation of risks. Indeed, the very fact that it is necessary to enter into a contract with a third party for such services demonstrates a certain lack of sophistication with respect to the task to be performed.

While Occidental is sophisticated in world chemical markets, trading, in this case, with the Soviet Union, it is not a shipbuilder. Its very lack of sophistication with shipbuilding in general, and the catug ITB design in particular, led it to Hvide, an entity with particular expertise concern-

ing the design, construction and operation of catugs. Occidential depended on Hvide to oversee the process of development and construction of the vessels it needed to trade with the Soviet Union. Instead of correctly performing this role, Hvide, along with Avondale, permitted the OXY PRODUCER to be delivered with catastrophic defects.

The extension of the *East River* rationale in this case goes too far. It is easy, in a commercial context, to be caught up in the talismanic language of "benefit of the bargain" and "equality of bargaining power" found in contract law, and fall prey to its illusory magic. When, as here, the Court blindly extends contract law into a area that still requires the protection of duties imposed by the law of tort, real harm can be done. It is up to this Court to break the spell. Occidental should not be forced to absorb a loss in excess of $30 million, resulting from Hvide's negligence, under the illusion that this result merely fulfills the expectations of the parties.

D. *East River* Cannot Be the Basis for Assertion in the Court of Appeals of a Defense Waived by Hvide in the Trial Court.

Although the debate concerning the economic loss rule was raging prior to *East River,* at no time throughout the course of the trial did Hvide assert the defense that plaintiffs' Complaint failed to state a claim, whether based on the economic loss rule, or otherwise. Nevertheless, because *East River* was the law in effect at the time of the decision on appeal, the Fifth Circuit, relying on *Bradley v. School Bd. of City of Richmond, VA.*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed. 2d 476 (1974), and *Nations v. Sun Oil Co.*, 695 F.2d 933 (5th Cir. 1983), *cert. denied* 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed. 2d 229 (1983), permitted Hvide to

assert this defense for the first time on appeal over the objection of the American Underwriters. *Employers Insurance,* 866 F.2d at 761 n. 11. By sustaining Hvide's contention, the Fifth Circuit incorrectly permitted Hvide to assert a defense it had waived in the Trial Court, and to escape a Judgment of liability for its negligence in supervising the construction of the OXY PRODUCER. This Judgment may have provided Occidental a basis for the recovery of a sum in excess of $30 million for the loss of the vessel. This action marks such a great departure from the accepted and usual course of judicial proceedings embodied in Rule 12(h)(2) as to warrant the exercise of this Court's power of supervision.

On appeal, Hvide contended that the Trial Court's conclusion that it was negligent in its supervision of the mating of the tug and barge units of the ITB was erroneous as a matter of law. It argued that, under the rule of *East River,* which was decided by this Court *after* the conclusion of the trial on the merits, a Complaint only alleging damage to a defective product failed to state a claim upon which relief may be granted. Because its conduct caused no injury to persons or property other than the Oxy Producer, Hvide contended that it fell within this rule, and, as a result, plaintiffs could assert no tort claim against it. Whether or not the rule of *East River* extends to supervisory services of the type performed by Hvide in connection with the construction of the OXY PRODUCER ITB, Hvide could not raise that defense in the Court of Appeals.

Rule 12(h)(2) of the Federal Rules of Civil Procedure permits the defense of failure to state a claim to be raised at any time *before* a disposition on the merits, but not *after. Snead v. Department of Social Services of New York,* 409 F.Supp. 995, 1000 (S.D. N.Y. 1975) *see also Black, Sivalls & Bryson, Inc. v. Shondell, 174 F.2d 587, 590-1 (8th Cir.*

1949). The defense may not be asserted for the first time on appeal. *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984). *See also Brule v. Southworth*, 611 F.2d 406, 409 (1st Cir. 1979), *Simpson v. Alaska State Comm. For Human Rights*, 608 F.2d 1171, 1174 (9th Cir. 1979).

Although Hvide cast its argument in the form of an appeal from an erroneous ruling of law, it merely attacked the legal sufficiency of the Complaint. Therefore, its contention should have been deemed to raise the defense of failure to state a claim, and should have been made no later than at the trial on the merits. *Weaver v. Bowers*, 657 F.2d 1356, 1359 (3d Cir. 1981), *cert. den.*, 455 U.S. 942, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982). The Fifth Circuit recognized that the thrust of Hvide's contention was that the Complaint failed to state a claim upon which relief could be granted, *Employers Insurance*, 866 F.2d at 759, but, nonetheless, permitted Hvide to raise that issue on appeal.

Neither of the decisions relied on by the Appellate Court support its action. *Bradley* involved an award of attorneys fees to a plaintiff in a school desegregation case. Although no statute authorized the award, the Trial Court in that case granted attorneys fees on equitable grounds. While the issue was pending in the Court of Appeals, Congress passed the Education Amendments Act of 1972. The statute expressly authorized the award of attorneys fees. The Court of Appeals refused to sustain the award and held that the statute could not be applied retroactively. The decision of the Court of Appeals was reversed by this Court and the statute applied, because the issue of attorney's fees *had been presented in the Trial Court* and was before the Court of Appeals at the time of the statute's enactment:

> The question, properly viewed, then, is not simply one relating to the propriety of retroactive ap-

> plication of (the statute) to services rendered prior to its enactment, but rather, one relating to the applicability of (the statute) to a situation *where the propriety of a fee award was pending resolution on appeal when the statute became law.* 94 S.Ct. at 2015.

The Fifth Circuit's own decision in *Nations* is of the same effect. There, an intervening decision extended the statutory employer defense arising under a workmans compensation statute. Although the defense had not been addressed initially in the defendant's appellate brief or in its Motion for Judgment Notwithstanding the Verdict, it had been timely raised in the Court below.

Both *Bradley* and *Nations* turned, in part, upon the fact that the intervening change in the law addressed issues which *already had been raised* in the Trial Court and were pending on appeal. Thus, rather than compel the rejection of plaintiffs' waiver argument, these decisions, if anything, *support* plaintiffs' position.[4]

Although Hvide's answer contained the general defense that the Complaint failed to state a claim upon which relief could be granted, this general statement was

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[4] This result is consistent with other cases applying *East River* on appeal to dismiss an action for failure to state a claim, *Pott Industries, Inc. v. Ingram River Equipment, Inc.*, 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed. 2d 560 (1986), *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987). In both of these cases, as in *East River* itself, the defense of failure to state a claim was raised and litigated at or before the trial on the merits. Therefore, the defense was timely raised and before the Court of Appeals, See *Ingram River Equipment, Inc. v. Pott Industries, Inc.*, 573 F. Supp. 896, 901 (E.D. Mo. 1983), *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 631 F. Supp. 1123, 1136 (E.D. La. 1986, *Aff'd* 825 F.2d 925 (5th Cir. 1987), *cert, den.*, —U.S.—, 108 S.Ct. 1472, 99 L.Ed. 2d 701 (1988). This is not the situation here.

insufficient to permit Hvide to press the issue for the first time in an Appellate Court. The statement of a defense in general terms suffices only when a single, definite and certain question is thereby presented. *C. Albert Sauter Co. v. Richard S. Sauter Co.,* 368 F. Supp. 501 (E.D. Pa. 1973). When the failure of the allegations to state a claim is not apparent from the face of the Complaint, a failure by a party to particularize the defects upon which it relies constitutes a waiver of the right to rely on the defense. *Smead v. Carpenter,* 274 F.2d 414 (9th Cir. 1960), *Sauter,* supra. A ground raised but not pressed or clearly presented to the district court is abandoned. *Heiar v. Crawford County, Wisconsin,* 746 F.2d. 1190 (7th Cir. 1984), *cert. den.,* 472 U.S. 1027, 105 S.Ct. 3500, 87 L.Ed. 2d 631 (1985), *Nathan Rodgers Construction & Realty Corp. v. City of Saraland,* 676 F.2d 162 (5th Cir. 1982). Hvide's perfunctory statement in its answer was inadequate to put plaintiffs on notice of its defense. This is particularly true because, at the time of trial, the economic loss rule adopted by this Court was not recognized in the maritime law of the Fifth Circuit. *See, Jig III, Corp. v. Puritan Marine Insurance Underwriters Corp.,* 519 F.2d 171 (5th Cir. 1975), *reh. den.,* 522 F.2d 1280 (5th Cir. 1975), *cert. den.,* 424 U.S. 954, 96 S.Ct. 1429, 47 L.Ed. 2d 360 (1976).

East River defined the requirements for a legally sufficient claim in maritime tort, and, as such, concerned the defense of failure to state a claim. Unlike a defense asserting a lack of subject matter jurisdiction over a claim, this defense can be waived if not timely asserted. Had Hvide pressed the defense of failure to state a claim in the Trial Court, as was done by the defendants in *Pott Industries* and *Shipco,* the latter of which also arose in the Fifth Circuit, there would be no question that the issue would have been before the Appellate Court and governed by *East River,* even though *East River* was decided after the com-

pletion of the liability portion of the trial. However, because the defense of failure to state a claim cannot be raised for the first time on appeal, and because Hvide failed to assert the defense at trial, any benefit afforded Hvide by this defense has been waived. Fed. R. Civ. P. 12 (h)(2). The Fifth Circuit's departure from Rule 12(h)(2) should not be permitted to stand.

CONCLUSION

In the aftermath of the sinking of the OXY PRODUCER, Occidental was left with its remedies under contract and the law of tort. It had contracted with Hvide, an expert in the design, construction and operation of catug ITB's, and with Avondale, an expert shipbuilder, both of whom warranted the seaworthiness of the ITB and purported to perform their roles with due care. However, even though the Court of Appeals found, as did the Trial Court, that Hvide and Avondale had breached their respective contracts and were negligent in their mating of the vessel, in the aftermath of its decision Occidental was left with nothing. The Fifth Circuit's tortured interpretation of the vessel construction contract deprived Occidental of the benefit of its bargain, a result directly contrary to the law of New York, which was chosen to govern the contract, and the expectation interests recognized by this Court in *East River*. The Court also extended the economic loss rule adopted in *East River* from the maintenance of product quality, an area where the need for the tort duties extinguished by the rule are weak, to the provision of professional services by a party other than the manufacturer, an area where the need for imposing a tort duty is strong. Finally, the Court incorrectly permitted the assertion of a defense which was waived in the Trial Court, resulting in a departure from the accepted course of judicial proceedings.

For the foregoing reasons, the Petition for Certiorari of the American Underwriters should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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FILED
JUN 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

In The

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

EMPLOYERS INSURANCE OF WAUSAU,
AS REPRESENTATIVE OF THOSE CERTAIN
UNDERWRITERS SUBSCRIBING TO
CERTIFICATE NO. 14880
Petitioner

v.

AVONDALE SHIPYARDS, INC.,
OGDEN CORPORATION,
SEABULK TRANSMARINE II, INC.,
HVIDE MARINE INTERNATIONAL, INC.,
AND HVIDE SHIPPING INCORPORATED,
Respondents

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

EMPLOYERS INSURANCE OF WAUSAU as Representative of Those Certain Underwriters Subscribing to Certificate No. 14880 and Certificate No. 14482,
Plaintiff-Appellee,

v.

SUWANNEE RIVER SPA LINES, INC., Suwannee River Chartering, Inc., Permian Trading Corporation, Occidental Export, Inc., Occidental Chemical Agricultural Products, Inc., and Occidental Petroleum Corp.,
Plaintiffs-Appellants,

v.

AVONDALE SHIPYARDS, INC., et al., Defendants, J.J. Henry Co., Inc., and Victoria Machine Works, Inc.,
Defendants-Appellees.

OCCIDENTAL PETROLEUM CORP., et al.,
Plaintiffs-Appellants,

v.

AVONDALE SHIPYARDS, INC., et al., Defendants, Victoria Machine Works, Inc.,
Defendant-Appellee.

OCCIDENTAL PETROLEUM CORP., et al.,
Plaintiffs-Appellants,

v.

AVONDALE SHIPYARDS, INC., et al., Defendants, Victoria Machine Works, Inc.,
Defendant-Appellee.

EMPLOYERS INSURANCE OF WAUSAU as Representative of those Certain Underwriters Subscribing to Certificate No. 14880 and Certificate No. 14482,
Plaintiff-Appellee,
Suwanne River Spa Lines, Inc., et al.,
Plaintiffs-Appellees,
v.
AVONDALE SHIPYARDS, INC., et al.,
Defendants-Appellants.

EMPLOYERS INSURANCE OF WAUSAU as Representative of those Certain Underwriters Subscribing to Certificate No. 14880 and Certificate No. 14482, et al.,
Plaintiffs-Appellees,
v.
AVONDALE SHIPYARDS, INC. and Ogden Corporation, Defendants-Appellants.
Nos. 86-3218, 86-3473 and 87-3549.

United States Court of Appeals,
Fifth Circuit.
Feb. 13, 1989.

Vessel owner brought action against builder and supervisor of construction of vessel to recover for losses sustained when vessel sunk. The United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., entered judgment for owner, and appeal was taken. The Court of Appeals, King, Circuit

Judge, held that: (1) rule that no products liability claim lies in admiralty when only injury claimed is economic loss applies to contracts for professional services, rendered in connection with manufacture or construction of product, by party other than builder or manufacturer, and (2) finding that vessel was improperly mated and unseaworthy on delivery, and that this was sole cause of loss, was sufficiently supported by evidence.

Affirmed in part, reversed in part, and remanded.

1. **Admiralty 11, 18**

Contracts relating to construction of vessels are not considered maritime contracts, and thus claims for breach of such contracts are not within admiralty jurisdiction; however, tort claims for negligent construction or design of vessel will lie in admiralty if negligence constitutes maritime tort.

2. **Admiralty 18**

Alleged negligence in construction or design of vessel was maritime tort where harm allegedly caused by tort occurred on high seas and in course of maritime commerce, for purpose of determining whether claims came within admiralty jurisdiction.

3. **Admiralty 18**

Federal court had admiralty jurisdiction over maritime tort claim, even if plaintiff could not recover for claims under substantive maritime law, in that claims were not patently without merit.

4. **Products Liability 17**

Rule that no products liability claim lies in admiralty when only injury claimed is economic loss applies to contracts for professional services, rendered in connection with manufacture or construction of product, by party other than builder or manufacturer, in that professional services are integral part of manufacture or construction.

5. **Action 27(1)**

Party that provides professional services as part of manufacture or construction of product has no duty in maritime tort, independent of its contractual obligations, to prevent a product from injuring itself.

6. **Shipping 80**

Owner of catamaran integrated tug barge could not recover from supervisor of design and construction for purely economic losses on theory of negligent performance of contract for professional services.

7. **Shipping 75**

Finding that manufacturer of catamaran integrated tug barge, and party supervising design and construction, breached their contracts by failing to deliver properly mated and seaworthy vessel, and that such failure was sole cause of vessel's sinking in storm, was sufficiently supported by expert testimony and physical evidence.

8. **Shipping 75**

Supervisor's acceptance of catamaran integrated tug barge from manufacturer did not insulate manufacturer from liability to owner for construction defects, though supervisor had been engaged by owner to supervise construction of vessel, in that manufacturer undertook independent contractual obligation to construct vessel according to plans and specifications; supervisor was independent contractor, without authority to unilaterally modify requirements of plans and specifications.

9. **Shipping 75**

Specifications in construction contract for construction of catamaran integrated tug barge contained express warranty that vessel would be seaworthy on delivery, where language of specifications indicated that object of contract was building of seaworthy vessel.

10. Shipping 75

Warranty of seaworthiness contained in vessel construction contract was subsumed in contract's guarantee deficiency clause, which restricted available remedies, in that clause covered "any deficiency" in construction.

11. Shipping 75

Clause in vessel construction contract, limiting owner's recovery to cost of repairing or replacing guarantee deficiencies, was effective, though vessel had sunk as result of deficiency, making repairs impossible, in that risk of damage was recognized by parties and contractually allocated to owner.

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James B. Kemp, Jr., Margot Mazeau, New Orleans, La., for Certain Underwriters at Lloyds.

Paul A. Nalty, Joel L. Borrello, Michael D. Carbo, New Orleans, La., for Victoria Machine Works.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before KING and JOHNSON, Circuit Judges, and BOYLE, District Judge.*

* District Judge of the Eastern District of Louisiana, sitting by designation.

KING, Circuit Judge:

I.

This lawsuit arises from the ill-fated voyage of the Oxy Producer, a catamaran integrated tug barge. While en route to the Soviet Union with a cargo of chemicals, the linkage system that held the tug and barge together as a single unit failed. Efforts to repair the vessel while at sea proved fruitless and the tug sank in heavy weather off the Azores. This lawsuit ensued, replete with claims and cross-claims against and between the owner and insurers of the vessel and various parties who played a role in its construction.

On appeal, we affirm the district court's holding that the vessel was improperly mated and unseaworthy on delivery and that this was the sole cause of the damage to the vessel and the loss of the tug. We hold, however, that the economic loss rule adopted in the *East River* case precludes recovery in maritime tort for purely economic loss stemming from the negligent performance of a contract for professional services where those services are rendered as part of the construction of a vessel. The plaintiffs are therefore limited to their contractual remedies against the contract supervisor. While the maritime tort claims must consequently be dismissed, we retain pendent jurisdiction over the remaining claims.

We hold further that the contract supervisor's acceptance of the vessel in its improperly mated condition was not binding on the purchaser, and that the shipbuilder is therefore fully liable to the owner for breach of contract. We find, however, that the Construction Contract effectively limits the shipbuilder's liability to the cost of repairing or replacing deficiencies in the contract work.

Finally, we hold that the district court improperly dismissed two parties from the suit following its conclusion that they were not liable for damage to the Oxy Producer. While we affirm that finding, we hold that dismissal was premature and remand for specific findings regarding the liability of all defendants for the damage to the Oxy Producer's two sister ships.

A. The Cast

1. *Plaintiffs*

Plaintiffs below were Suwannee River Lines, Inc., Suwannee River SPA Lines, Inc., and Suwannee River Phosphate Lines, Inc. (collectively, the "lines"), the bareboat charterers of, respectively, the Oxy Trader, the Oxy Producer, and the Oxy Grower (collectively, the "ships"); Suwannee River Chartering, Inc. ("Chartering"), the time-charterer of the ships; Occidental Export, Inc. ("Export"), the seller

of certain chemicals transported by the ships; and Occidental Petroleum Corp. ("Occidental"), the parent corporation of all of the preceding plaintiffs. Additionally, the American underwriters and certain underwriters at Lloyds assert subrogated claims.

Lines, Chartering, Export, Chemical, and Occidental are referred to collectively as "Occidental" or as the "Oxy plaintiffs." Because this lawsuit focuses primarily on the sinking of the Oxy Producer, it will be referred to most often, and the Oxy Grower and Oxy Trader will be referred to as the "sister ships."

2. *Defendants*

The defendants are J.J. Henry Co., a naval architectural firm; Avondale Shipyards, Inc. ("Avondale"); Ogden Corp. ("Ogden"), guarantor and former parent of Avondale; Victoria Machine Works, Inc. ("Victoria"), the manufacturer and supplier of certain component parts for the ships; and Seabulk Transmarine I, Inc., Seabulk Transmarine II, Inc., Hvide Marine International, Inc., and Hvide Shipping, Inc. (collectively, "Hvide"), supervisors of the design and construction of the vessel. Hvide also provided the crew of the Oxy Producer and thus appears in this law suit in two roles.

B. The Claims

In the early 1970's, Occidental entered an agreement to manufacture, sell, and transport

superphosphoric acid ("SPA") to the Soviet Union. Shortly thereafter, Occidental arranged for the construction of three catamaran integrated tugbarges ("catug ITBs") to transport the SPA to the Soviet Union.[1] The unique feature of a catug ITB is the interconnection system between the tug and barge units consisting of bumper pads, link arms, and greenheart-bearing surfaces which are designed to hold the tug and barge together as a single rigidly connected unit.

Defendant Hvide holds a patent on the catug design and was retained, because of its expertise with this type of vessel, to supervise the design and construction of the vessels for Occidental ("Supervision Agreement"). Hvide contracted in turn with J.J. Henry to prepare the plans and specifications for the vessels ("Henry Agreement"). Hvide assigned the Henry Agreement to Occidental. Occidental then engaged Avondale to construct the vessel ("Construction Contract"). Avondale entered into a subcontract ("Purchase Order") with Victoria to manufacture the bumper pads for the catug's interconnection system.

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1 Occidental formed a subsidiary, Suwannee River SPA Finance, Inc. ("Finance"), for the purpose of constructing the Oxy Producer. To avoid further confusion, given the number of subsidiaries involved, we do not refer to Finance separately in the text although it was the original party to the contracts discussed above. Finance ultimately assigned its rights under the Supervision Agreement, the Henry Agreement, and the Construction Contract to the Oxy plaintiffs.

The vessels were completed and delivered between March and September of 1981. The Oxy Producer was delivered on June 9, 1981 and made one uneventful round-trip voyage between the United States and the Soviet Union. Its second voyage, however, was disastrous. The Oxy Producer embarked from Jacksonville, Florida on September 5, 1981. On the evening of September 11, the Oxy Producer encountered weather conditions more severe than any it had previously encountered. During the early morning hours of September 12, a crewmember on watch first noticed relative movement between the tug and the barge. The movement increased and the crew discovered, on examination, that parts of the linkage system were damaged. The crew attempted to make temporary repairs but the movement worsened and the linkage system deteriorated further. The captain of the Oxy Producer, Captain Kanellos, decided to divert the vessel to the Azores in order to make repairs. The vessel arrived at the Port of Ponta Delgada in the Azores on September 14 but was denied entry into the harbor. While the crew awaited the result of further efforts to obtain permission to enter the harbor, they effected further repairs to the ship which remained at anchor a half mile off the breakwater at Ponta Delgada. The weather forecast on September 18 was for heavy weather on September 20 due to tropical storm Harvey, passing to the southwest of the Azores. On the night of the 19th, Captain Kanellos evaluated

possible responses to the predicted change in weather. Afraid of dragging anchor and spilling his hazardous cargo if the ship remained anchored near the breakwater, the captain decided early on the morning of the 20th to weigh anchor and maneuver the vessel away from the breakwater. Before the vessel could proceed, however, a second storm, coming from the north, passed over the area, creating confused seas and causing even greater movement between the tug and the barge. The movement of the barge tongue against the hulls of the tug ultimately opened large holes in the hulls, causing the tug to sink.

Following the sinking of the Oxy Producer, the Coast Guard revoked the inspection certificates on the Oxy Producer's two sister ships--the Oxy Trader and the Oxy Grower. The linkage systems on each of the sister ships were subsequently repaired and upgraded.

Occidental then brought this lawsuit to recover damages stemming from the loss of the Oxy Producer and from the recision of the certificates of inspection for the two sister ships.[2] The Oxy plaintiffs asserted that the sinking of the Oxy Producer's tug was due to defendants' breaches of their contractual duties and to negligence in the performance of their contracts and that defendants are similarly responsible for the repairs to the sister ships. The claims against the various defendants were as follows:

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2 Originally, three separate complaints were filed. The complaints were consolidated for trial.

Henry: The Oxy plaintiffs asserted below that Henry breached its warranty that the plans and specifications were seaworthy. The plaintiffs also alleged that Henry was negligent in performing its contract, particularly in failing to consult the patent, to conduct model tests, or to follow up on defects noted in its plan review.

Avondale: Plaintiffs asserted that Avondale breached its contract and its warranty and specifically that, when delivered, the Oxy Producer was not properly mated in accordance with the plans and specifications, that the link arms and bumper pads were defective, and that the vessel consequently was not seaworthy. The plaintiffs also alleged that Avondale was negligent in performing its contract and in delivering the vessel in an unseaworthy condition.

Avondale responded that it could not be held liable for any deficiency in the mating of the vessel because Hvide was Occidental's agent and authorized the mating procedure and accepted delivery of the vessel with full knowledge of the measurements of the fit which Occidental now claims were not in accordance with the plans and specifications. Avondale further asserted that the loss of the tug was due to the crew's negligence in failing to tighten the linkage system after the first voyage, and not to an initially improper mating. Avondale also claimed that once the problem

was discovered, the tug would not have been lost if the captain had been sufficiently diligent in his efforts to secure entry into the harbor.

Victoria: Plaintiffs claimed that they were third party beneficiaries of the Victoria Purchase Order and that Victoria breached its contract and its warranty in two respects: first, the bumper pads were not sufficient to restrict relative movement between the tug and the barge, and second, the bumper pads were not vulcanized as required by the Purchase Order.

Hvide: Plaintiffs asserted that Hvide breached its contract and its warranty that the catug design was seaworthy and had been fully integrated into the plans and specifications. Plaintiffs also claimed that Hvide was grossly negligent in performing its contractual duties.

C. The District Court Opinion

At the conclusion of a three and one half month bench trial, the district court concluded that the sole cause of the sinking of the Oxy Producer was that the vessel had not been properly mated and was therefore unseaworthy on delivery. The court found that Avondale had breached its contract and its express warranty of seaworthiness and had been negligent in the performance of its contract, but found that the Construction Contract effectively disclaimed tort liability. The court also found that Hvide had breached its Supervision Agreement and its warranty that the plans were seaworthy and that Hvide had furthermore

been negligent in supervising the mating of the vessel. The court found that the Supervision Agreement did not limit Hvide's liability in tort, so that Hvide could be liable for damages beyond the $5 million limitation provided in the contract.

The district court found that the bumper pads and link arms did not cause or contribute to causing any of the damage to the Oxy Producer but were instead casualties themselves of the improper fitting. Because Victoria and Henry were not responsible in any way for the poorly mated condition in which the vessel was delivered, they were dismissed from the case.

The proceedings below were bifurcated and the district court has not yet addressed the issue of damages.

D. The Appeal

1. *Claims on Appeal*

The Oxy plaintiffs appeal from the dismissal of Victoria and Henry. Hvide asserts on appeal that in light of the Supreme Court's decision in *East River*, the negligence claims against Hvide are not cognizable in maritime tort. Hvide also claims that the district court's finding that the improper mating of the vessel was the sole cause of its sinking is not supported by a preponderance of the evidence. Hvide argues further that even if the negligence claims are cognizable in maritime tort, the district court erred in holding that the limitation of liability contained in the Supervision

Agreement did not apply to negligence claims as well as to contract claims. Hvide also asserts that the district court erred in imposing joint and several liability.

Going one step further than Hvide, Avondale urges that *East River* so clearly bars plaintiffs' negligence claims that the federal courts lack admiralty jurisdiction over this case. Avondale also challenges the dismissal of Henry, arguing that the evidence supports a finding that Henry's design of the linkage system was defective. Avondale further asserts that even if the vessel was improperly mated, the district court erred in finding that Hvide's acceptance of the vessel was not binding on Occidental. Avondale also contests the district court's finding that Avondale failed to prove that negligence of the vessel's captain or crew was an intervening or contributory cause in the damage to the vessel or in the loss of the tug. Finally, Avondale contends that even if it is liable for the improper mating of the vessel, the district court erred in concluding that Avondale's liability for breach of the warranty of seaworthiness was not limited by the guarantee deficiency clause of the Construction Contract. Avondale too contests the imposition of joint and several liability.

These claims comprise seven broad issues which we will address in turn: (1) the effect of the *East River* decision on this case, (2) whether the district court erred in finding that Avondale and Hvide breached

their contracts by failing to deliver a properly mated and seaworthy vessel, (3) whether Hvide's acceptance of the fitting was binding on Occidental, (4) whether the district court erred in concluding that the Construction Contract created an express warranty of seaworthiness independent of the contract's limitations of remedies and liability, (5) whether the district court erred in holding that the Supervision Contract did not limit Hvide's liability in negligence, (6) whether the district court erred in holding Hvide and Avondale jointly and severally liable, and (7) whether the district court erred in dismissing Henry and Victoria from the suit.

2. *Standard of Review*

The district court's findings of fact may not be set aside on appeal unless they are clearly erroneous. Fed.R.Civ.Proc. 52(a). A finding of fact is clearly erroneous only if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). The district court's conclusions of law, however, are freely reviewable on appeal. *Inwood Labs v. Ives Labs,* 456 U.S. 844, 855 n. 15, 102 S.Ct. 2182, 2189 n. 15, 72 L.Ed.2d 606 (1982).

II.

A. The Effect of the *East River* Decision

1. Admiralty Jurisdiction

Defendants argue that in light of the Supreme Court's decision in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986), the federal courts have no admiralty jurisdiction over this case. In *East River,* the Supreme Court adopted the established rule of the Courts of Appeal that concepts of products liability, grounded in both negligence and strict liability, are a part of general maritime law. *Id.* 476 U.S. at 865, 106 S.Ct. at 2299. The Court held, however, "that a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." *Id.* at 871, 106 S.Ct. at 2302. "Thus, whether stated in negligence or strict liability, no products-liability claim lies in admiralty when the only injury claimed is economic loss." *Id.* at 876, 106 S.Ct. at 2304.

[1,2] The defendants contend that because the plaintiffs' negligence claims, like those of the *East River* plaintiffs, allege only economic loss, those claims

do not sound in maritime tort and therefore do not provide a basis for admiralty jurisdiction.[3]

The plaintiffs, however, note correctly that *East River's* holding has limited implications for the existence of admiralty jurisdiction. Whether a tort is maritime in nature, and therefore within the admiralty jurisdiction of the federal courts, turns on the application of the "situs" and "nexus" tests set forth in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409

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3 Contracts relating to the construction of vessels are not considered maritime contracts. *Kossick v. United Fruit Co.,* 365 U.S. 731, 735, 81 S.Ct. 886, 889, 6 L.Ed.2d 56 (1961); *Walter v. Marine Office of America,* 537 F.2d 89 (5th Cir.1976). Consequently, claims for breach of such contracts are not within the admiralty jurisdiction. However, tort claims for negligent construction or design of a vessel will lie in admiralty if the negligence constitutes a maritime tort. *Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp.,* 519 F.2d 171, 174 (5th Cir.1975).

The district court correctly found that plaintiffs' negligence claims constituted maritime torts because (1) the harm allegedly caused by the tort occurred on the high seas--meeting the locality requirement for admiralty jurisdiction and (2) they occurred in the course of maritime commerce--satisfying the requirement that the tort bear a substantial relationship to traditional maritime activities. The district court also agreed to exercise pendent jurisdiction over the contract claims.

Because admiralty jurisdiction was premised in this case on plaintiffs' tort claims, defendants contend that if *East River* bars those claims, the grounds for admiralty jurisdiction are eliminated.

U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). If those requirements are met, the court has jurisdiction. Whether the plaintiff may recover for those torts is not a question of admiralty jurisdiction but of substantive maritime law. In East River itself, the Supreme Court found that under the "locality" test the plaintiff's tort claims were within the admiralty jurisdiction.[4] Applying substantive maritime law, the Court then affirmed the granting of summary judgment in favor of defendants based on its conclusion that the negligence claims were not cognizable in maritime tort.

Although defendants argue here that plaintiffs have failed to state a claim on which relief can be granted, the Supreme Court made clear in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), that whether the court lacks subject matter jurisdiction and whether the plaintiff fails to state a claim on which relief can be granted are distinct questions:

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4 The Supreme Court declined to decide whether the additional requirement of a "maritime nexus," necessary to establish admiralty jurisdiction over torts occurring on navigable waters within the United States, was also necessary to establish jurisdiction over torts occurring on the high seas. 476 U.S. at 864, 106 S.Ct. at 2298. Because the ships were engaged in maritime commerce, "a primary concern of admiralty law," the Court found that if there were a "maritime nexus" requirement it would have been met. *Id.* Similarly, there is a sufficient maritime nexus in this case to meet the second prong of the *Executive Jet* test.

> Jurisdiction ... is not defeated ... by the possibility that the averments might fail to state a cause of action on which [the plaintiff] could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Id. 327 U.S. at 682, 66 S.Ct. at 776. *Bell* recognized two exceptions to this rule. A suit may be dismissed for want of jurisdiction when (1) the allegations are clearly concocted for the sole purpose of obtaining federal jurisdiction, or (2) the claims are "wholly insubstantial and frivolous." *Id.*

[3] Thus, the federal courts would lack subject matter jurisdiction over this suit only if the plaintiffs' tort claims are so clearly barred by the *East River* holding that they fall within one of the *Bell* exceptions. We do not think that the plaintiffs' negligence claims are "so patently without merit" as to deprive the

federal courts of subject matter jurisdiction.[5] *Id.* 327 U.S. at 683, 66 S.Ct. at 776.

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5 Defendants urge that *Boson Marine 6 Ltd. v. Crown Point Indus.*, 854 F.2d 46 (5th Cir.1988), is "extremely pertinent" to the jurisdiction issue. In that case, we found that following *East River*, the plaintiff's efforts to recover on a theory of strict product liability for damages to the product itself did not state a claim cognizable in maritime tort law. While the court did affirm the district court's dismissal of the case for lack of subject matter jurisdiction, the basis for this affirmance is ambiguous.

After holding that the plaintiff's product liability claim was not cognizable in maritime tort, the *Boson* court also rejected the plaintiff's argument that there was an additional basis for admiralty jurisdiction. The court held that the defendant's promise to "take care of" any problems caused by the equipment did not amount to a contract to repair the vessel--which would be maritime in nature--but constituted at most a warranty of the equipment. The court then concluded that "[b]ecause a claim for breach of warranty is not within the admiralty jurisdiction," the case was properly dismissed for lack of subject matter jurisdiction. *Id.*

It is therefore unclear whether the court in *Boson* was concluding that the product liability claims were "so patently without merit" in light of *East River* as to deprive the court of subject matter jurisdiction, or whether the tort claims were dismissed on their merits, and the dismissal for lack of subject matter jurisdiction upheld because there was no admiralty jurisdiction over the remaining warranty claim. (The fact that the court did not discuss the possibility of pendent jurisdiction over the warranty claim could indicate that the first holding was jurisdictional, but is hardly conclusive.)

In *East River,* the Court expressly declined to decide "whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic." 476 U.S. at 871 n. 6, 106 S.Ct. at 2302 n. 6. The *East River* decision thus stopped short of holding that a tort claim for purely economic loss would never be cognizable in maritime tort. Therefore, a maritime tort claim alleging purely economic loss should not be dismissed for want of subject matter jurisdiction where the requirements for admiralty jurisdiction are otherwise met if the facts of the case support a theory of recovery not clearly barred by *East River* or by other controlling authority.

In admiralty, as in other areas of subject matter jurisdiction, we have held that if the issues necessary to decide the question of subject matter jurisdiction are intertwined with the merits, the court should assume jurisdiction and proceed to the merits of the claim unless the maritime basis for the claim is "immaterial

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5 In any event, *Boson* may be distinguished from the instant case because the *Boson* plaintiff's tort claims--against the manufacturer of an allegedly defective product that caused injury only to itself--fell clearly within the parameters of the *East River* holding.

or is wholly insubstantial."[6] *See Parker v. Gulf Fisheries, Inc.*, 803 F.2d 828, 829 (5th Cir. 1986); 14 Wright, Miller & Cooper *Federal Practice & Procedure* § 3676 (Supp. 1988) (citing *Parker*).

In the instant case, we find that the plaintiffs' claim that Hvide was negligent in performing its obligations under the Supervision Agreement are not so clearly precluded by *East River* as to deprive the federal courts of admiralty jurisdiction.[7] The district court held on remand that the claim against Hvide was distinguishable from the claims in *East River* because the Oxy plaintiffs alleged negligence in the performance

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6 This approach does not place a burden on judicial resources because the court may render a decision on the merits early in the proceedings--on a Rule 12(b)(6) motion for failure to state a claim, or on a motion for summary judgment. If the federal claims are dismissed, and there is no other ground for federal jurisdiction, the district court may also dismiss any pendent state law claims.

7 Our discussion focuses on the negligence claims against Hvide because the negligence claims against Avondale are not an issue on appeal. While the district court found that Avondale was negligent in its performance of the Construction Contract, it also found that the contract disclaimed liability in tort. That holding is not contested here.

The negligence claims against Avondale would, moreover, be precluded by our decision in *Shipco 2295 Inc. v. Avondale Shipyards Inc.*, 825 F.2d 925 (5th Cir.1987) (applying *East River* economic loss rule to tort claims against shipbuilder), *cert. denied*, --- U.S. ----, 108 S.Ct. 1472, 99 L.Ed.2d 701 (1988).

of a contract for professional services. Defendants have countered that one of the claims in *East River* was similarly for negligent supervision--of the installation of a component part of the vessel. We note, however, that the economic loss rule adopted in *East River* applies specifically to claims against manufacturers and that the supervisor and the manufacturer in *East River* were one and the same.[8] The *East River* decision does not address whether the economic loss rule in maritime tort applies to contracts for professional services[9] where the provider of the services is a party other than the manufacturer itself.[10]

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8 The *East River* plaintiffs alleged that the defendant, "as part of the manufacturing process," negligently supervised the installation of a component part. 476 U.S. at 871, 106 S.Ct. at 2302.

9 Indeed, in declining to foreclose altogether the possibility that "a tort cause of action could be stated in admiralty when the only damages sought are economic," the Court cites *Ultramares v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931), a case allowing third parties to recover damages for negligence in the performance of a contract for professional services. 476 U.S. at 871 n. 6, 106 S.Ct. at 2302 n. 6.

10 Defendants also argue that our decision in *Shipco*, "makes clear that even a designer of equipment, who was in no way involved--not even as a supervisor--in the manufacturing process, is still within the rule of *East River*." Defendants, however, are not entirely accurate in their characterization of this portion of our decision in *Shipco*. *Shipco* did not foreclose the possibility that a provider of services could be treated differently than a manufacturer or builder. In asserting the liability of the designer of the component part, the plaintiffs in *Shipco* did not rely on the

We therefore will not dismiss Occidental's negligence claims against Hvide for lack of subject matter jurisdiction. Rather, we hold that this case falls within the admiralty jurisdiction and will decide, on the merits, whether the plaintiffs' negligence claims are cognizable in maritime tort following the *East River* decision.

2. *Are Plaintiffs' Negligence Claims Cognizable in Maritime Tort?*

While we agree with the district court's characterization of the Supervision Contract as one for the provision of professional services, we do not agree that this answers the question whether plaintiffs' negligence claims are cognizable in maritime

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the distinction between a manufacturer and a provider of services. Rather, they argued that under *East River's* "other property" exception, the designer of a component part could be held liable for damages to a vessel. We held that "[t]he critical fact [was] that *Shipco* bargained for a finished vessel." 825 F.2d at 929. The vessel therefore could not be treated as "other property" in relation to the allegedly defective component part.

While we agree with defendants that *East River* militates against drawing a distinction between a provider of services and a manufacturer, *Shipco* did not expressly decide whether the *East River* rule applies to a provider of services who is distinct from the manufacturer or builder.

tort.[11] Rather, this case raises an issue of first impression: Does the *East River* economic loss rule apply to contracts for professional services, rendered in connection with the manufacture or construction of a product, by a party other than the builder or manufacturer?[12] In order to determine whether

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11 Plaintiffs' assertion that defendants have waived their argument that the negligence claims against Hvide are not cognizable in maritime tort is without merit. We must apply the law in effect at the time of our decision, not the law that was in effect when the case was argued or decided by the district court. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); *Nations v. Sun Oil Co.*, 695 F.2d 933 (5th Cir.), *cert. denied*, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 229 (1983). *East River* effectively overruled the law of this circuit regarding the ability of plaintiffs to recover in maritime tort for purely economic losses. *Shipco*, 825 F.2d at 927. While the *East River* economic loss rule does not specifically include service contracts, neither has the Supreme Court or any circuit recognized an exception to the rule. Therefore, to determine whether plaintiffs' negligence claims are cognizable in maritime tort following *East River*, we must first determine the scope of the rule.

12 To the extent that a contract for the construction of a vessel is considered to be a service contract, compare *In re American Export Lines*, 620 F.Supp. 490, 515 (S.D.N.Y.1985) (contract for construction of vessel is predominantly for services, and therefore is not governed by U.C.C.) *with Silver v. Sloop Silver Cloud*, 259 F.Supp. 187 (S.D.N.Y.1966) (applying U.C.C. to contract for construction of vessel), our holding in *Shipco* provides further support for our holding today. In *Shipco*, we applied the *East River* rule to tort claims against a shipbuilder without addressing explicitly the goods/services dichotomy.

East River's rationale should be extended to this context, we must review carefully the Court's reasoning and the possible arguments against limiting plaintiffs to their contractual remedies.

In deciding to limit the scope of products liability in the maritime tort context, the Supreme Court comprehensively reviewed the origins and purposes of the doctrine and its relationship to contract law. The Court noted that "[p]roducts liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty." 476 U.S. at 866, 106 S.Ct. at 2299. Expressing concern, however, "that if this development were allowed to progress too far, contract law would drown in a sea of tort," the Court answered in the negative the question that it posed at the outset of the case: "whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, independent of any contractual obligation." *Id.*

The Court reasoned that "[w]hen a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong."[13] *Id.* at 871, 106 S.Ct. at 2302.

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13 The Court also rejected as "too indeterminate" the intermediate land-based positions that allow recovery for damage to the product alone when the defect poses a *risk* of personal injury or damage to other property. 476 U.S. at 870, 106 S.Ct. at 2301.

A manufacturer is liable without negligence under strict products liability because "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Id.* at 866, 106 S.Ct. at 2299. (quoting *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 462, 150 P.2d 436 (1944) (concurring opinion)). The manufacturer's duty of care was, for similar reasons, expanded to include protection against property damage. *Id.* 476 U.S. at 867, 106 S.Ct. at 2300. While conceding that "damage to a product itself has certain attributes of a products-liability claim," the Court concluded that "the injury suffered--the failure of the product to function properly--is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain." *Id.* at 867-68, 106 S.Ct. at 2300-01.

The Court reasoned that contract law provides adequate remedies in a commercial setting where the parties are generally of equal bargaining power. In this context, the parties are able to allocate between themselves the risks of defects. *Id.* at 872-73, 106 S.Ct. at 2302-03. Moreover, to the extent that the purchaser is unable to recover from the manufacturer the full measure of expectation damages that are available in a warranty or breach of contract action, it may insure against such losses. *Id.* at 873, 106 S.Ct. at 2303. "Society need not presume that [such] a customer

needs [the] special protection" of an extracontractual remedy. "The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified." *Id.* at 872, 106 S.Ct. at 2302.

Plaintiffs argue that because Hvide contracted only to provide professional services and did not manufacture any part of the Oxy Producer, *East River's* rationale for confining the parties to their contractual remedies does not apply. It is true that some jurisdictions recognize an exception to the economic loss rule when the underlying contract is for the provision of professional services.[14] *See Consol. Edison Co. v. Westinghouse Elec. Corp.*, 567 F.Supp. 358, 365 (S.D.N.Y.1983) (New York cause of action for negligent performance of contractual duties should not be applied outside context of negligence in the performance of services); *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 664 F.Supp. 91 (S.D.N.Y.1987), *rev'd on other grounds*, 859 F.2d 242 (2d Cir.1988);[15] *cf. Republic Steel Corp. v. Penn. Engineering Corp.*, 785 F.2d 174, 182 n. 13 (7th

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14 Plaintiffs argue erroneously that New York law is controlling on this point. While it is undisputed that New York law governs the interpretation of the Supervision and Construction Contracts, the question before us is whether plaintiffs' negligence claims are cognizable in *maritime tort*, not whether they are cognizable under New York law.

15 These cases are remarkably silent on the *reasons* for excepting contracts for professional services from the economic loss rule.

Cir.1986) (not reaching question whether Illinois law recognized such an exception because contract found to be predominantly for sale of goods); *Adams Labs v. Jacobs Engineering Co.*, 761 F.2d 1218, 1223 (7th Cir.1985) (whether Illinois would recognize exception to economic loss rule for design professionals unclear). But see *Flinkote Co. v. Dravo Corp.*, 678 F.2d 942, 949-50 (11th Cir.1982) (Georgia courts would not recognize exception to economic loss rule for professional services--particularly where services were rendered in process of manufacturing or constructing a product).

[4] The question before us is whether such an exception should be recognized in maritime tort. We conclude that *East River's* broad concern for preserving the integrity of contract law in commercial settings applies equally to a case such as this where the professional services are an integral part of the manufacture or construction of a product and where the only injury alleged is to the product itself.

As in *East River*, the damage alleged here is purely economic. Thus, the public policy concerns which underpin the imposition of a duty in tort--the need to provide consumers with greater protection from personal injury and property damage than is afforded

by warranty or contract--are not implicated.[16] 476 U.S. at 866, 106 S.Ct. at 2299; see also Prosser & Keeton on Torts 693 (5th ed. 1984).

The only remaining reasons for concluding that contract law does not provide an adequate remedy for a buyer of professional services who incures purely economic loss are (1) it may be more difficult to define in a contract what constitutes satisfactory performance of services and (2) contracts for services are not subject to the implied warranties of the Uniform

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16 We reject plaintiffs' contention that the claims against Hvide fall within *East River's* "other property" exception. We held in *Shipco*, that the designer of a component part could not be treated separately from the manufacturer for purposes of the "other property" exception. 825 F.2d at 928 (noting that *East River* involved an identical claim). Because the completed vessel was the object of the contract, the vessel itself could not be considered "other property" in relation to its component parts. *Id.* Hvide's services were similarly an integral part of the construction of the Oxy Producer. Therefore, the vessel itself cannot be regarded as "other property" in relation to Hvide's services.

Plaintiffs' argument that loss of the Oxy Producer's cargo constitutes damage to "other property" is also without merit. *Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*, 830 F.2d 1321, 1328 n. 5 (5th Cir.1987) (loss of cargo is not damage to "other property" within meaning of *East River*).

Commercial Code.[17] We find that neither of these considerations provides an adequate reason for imposing an extracontractual duty on one who contracts to provide professional services in a commercial context.

We recognize that in some cases it may be more difficult to define what constitutes the satisfactory performance of services than it is to define what constitutes a satisfactory product.[18] *See PPG Indus.*,

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17 Admiralty law, of course, recognizes an implied warranty of workmanlike service which arises from contractual relationships. *Ryan v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 133-34, 76 S.Ct. 232, 237-38, 100 L.Ed. 133 (1956). Other jurisdictions find that a similar standard of performance, analogous to a duty of care in tort, is implied in service contracts. *See Milau Assoc. v. North Ave. Development Corp.*, 42 N.Y.2d 482, 398 N.Y.S.2d 882, 368 N.E.2d 1247, 1251 (Ct.App.1977) (citing *Bloomsburg Mills, Inc. v. Sordoni Constr. Co.*, 401 Pa. 358, 164 A.2d 201 (1960); *Union Mar. & Gen. Ins. Co. v. American Export Lines*, 274 F.Supp. 123 (S.D.N.Y.1966); *Pepsi Cola Bottling Co. v. Superior Burner Serv. Co.*, 427 P.2d 833 (Alaska 1967); *Wolfe v. Virusky*, 306 F.Supp. 519 (S.D.Ga.1969)). Unlike the implied warranties of the U.C.C., however, these warranties necessarily parallel a negligence standard rather than imposing strict liability.

18 We note, however, that the standards which define satisfactory goods under the implied warranty provisions of the U.C.C.-- merchantability or fitness for a particular purpose--are not terribly determinate. U.C.C. §§ 2-314, 2-315, 1 U.L.A. 371-72, 482 (1976 & Supp.1988).

Inc. v. Sundstrand Corp., 681 F.Supp. 287, 290 (W.D.Pa.1988). This problem is minimized, however, when the parties possess equal bargaining power. In such cases, the parties are capable of bargaining for a definition of adequate performance that focuses on either "outcome" or "effort." *See* Comment, *Guidelines for Extending Implied Warranties to Service Markets*, 125 U.Pa.L.Rev. 365, 382-86 (1976) (discussing differing effects of "effort-oriented" and "outcome-oriented" standards). The contract could incorporate a guarantee that the contract will be performed in a "workmanlike" manner.[19] Alternatively, when the services are directly related to the manufacture of a product, the parties may impose a higher standard, defined with reference to the product itself.[20]

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19 We note that the Supervision Contract contains an express warranty of workmanlike performance. Thus, it is clearly not unrealistic to expect that parties can bargain for such guarantees.

20 While the quality of the services may be defined in terms of the quality of the finished product, this does not alter the fact that the Supervision Contract is one for the provision of services rather than for the sale of goods. The fact that the services were rendered as part of the construction of the Oxy Producer does, however, militate against excepting such service contracts from the economic loss rule. *See infra* note 28.

A more significant reason for imposing an extracontractual duty of care on sellers of services, but not on sellers of goods, may be that contracts for services are not governed by the U.C.C.[21]

There are particularly strong reasons for leaving to the U.C.C. commercial disputes over economic losses stemming from defective products because "[t]he maintenance of product value is precisely the

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21 The distinction between goods and services has been widely criticized, and has been particularly difficult to define in the context of "hybrid contracts"--such as construction contracts, contracts for repairs that involve the provision or replacement of a part, or sales contracts that include installation. *See, e.g., J. White & R. Summers, Uniform Commercial Code* 346-49 (2d ed. 1980); *Article Two Warranties in Commercial Transactions: An Update,* 72 Cornell L.Rev. 1159, 1199-1201 (1987) (suggesting that courts analogize services to goods where the buyer's reliance on the service provider resembles a buyer's reliance on a merchant when purchasing a good); Note, *Disengaging Sales Law from the Sale Construct: A Proposal to Extend the Scope of Article II of the U.C.C.,* 96 Harv.L.Rev. 470 (1982); Comment, *Extending Implied Warranties, supra. See also Prosser & Keeton on Torts, supra,* at 720 (discussing difficulty of distinguishing sales and service contracts for purposes of determining whether action may lie in strict products liability).

The difficulty of drawing this distinction further militates against excepting contracts for services from the economic loss rule. *See infra* note 28.

purpose of express and implied warranties."[22] *Id.; see also Prosser & Keeton on Torts, supra* at 708-09 (risk of harm to the product itself is type of risk that parties to purchase and sale contracts should be allowed to allocate pursuant to the terms of the contract--especially in the commercial context); Note, *Privity Revisited: Tort Recovery by a Commercial Buyer for a Defective Product's Self-Inflicted Damage,* 84 Mich.L.Rev. 517 (1985) (arguing that imposition of tort liability in cases where the parties are in privity and the product injures only itself does not achieve optimal allocation of risks). On the rationale of *East River,* the implied warranties provided by Article II of the U.C.C. are an adequate replacement for the imposition of a duty in tort when the defective product has injured only itself.

Arguably, because contracts for services are not subject to the implied warranties provided by the U.C.C., it is necessary to impose a duty of proper performance in tort in order to provide the buyer of services with analogous protection from economic

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22 Allowing extracontractual remedies in tort may also defeat the U.C.C.'s goal of achieving uniformity and predictability in commercial transactions. *See* White & Summers, *supra,* note 21, at 20-21 (discussing goals of U.C.C.); Note, *Disengaging Sales Law, supra,* note 21, at 470 (same).

loss.[23] See Note, Extending Implied Warranties, supra, at 393 (because no implied warranties apply to contracts for services, an aggrieved buyer must rely on a tort remedy). This rationale is persuasive in a noncommercial context where the purchaser of services is not in a position to bargain for a specific guarantee of the quality of the service. See generally, id. (arguing for extension of implied warranties to certain service markets in order to protect consumers).

In a commercial context, however, parties are generally capable of allocating the risk of defective performance of a contract for services in the same way that they can allocate the risk of a defect in the product itself.[24] While the commercial purchaser of

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23 While implied warranties impose strict liability, their protective value is diminished by the fact that they may be disclaimed entirely, leaving the buyer with only an argument that the disclaimer at issue is unconscionable. This is mitigated in the consumer context by the provisions of the Magnuson-Moss Warranty Act which restrict substantially the parties' freedom to disclaim the implied warranty of merchantability.

24 In limiting the buyers of defective commercial goods to their contractual remedies, New York courts have followed essentially the same rationale as the Supreme Court in *East River*: "Economic loss results from the failure of the product to perform to the level expected by the buyer and the seller.... The original purchaser, particularly a large company ... can protect itself against the risk of unsatisfactory performance by bargaining for a warranty." *Consolidated Edison*, 567 F.Supp. at 365 (quoting *Schiavone Construction Co. v. Elgood Mayo Corp.*, 81 A.D.2d 221, 439 N.Y.S.2d 933, 939 (1982)).

services will not have the benefit of implied warranties imposed by the U.C.C., it may bargain--as mentioned above--for an express warranty of workmanlike performance or for an express warranty defined in terms of the quality of the finished product.[25] The contract price would then turn in part on whether the provider of services is willing to guarantee that its performance of the contract will be satisfactory.

At least one district court has agreed with this analysis, finding *East River* to be persuasive authority for applying the economic loss rule to a commercial party's claim of negligent performance of a contract for professional services. In *PPG Industries,* a non-maritime case involving a dispute over an engineering agreement, the court noted that "the special non-contractual duties of professionals such as doctors, lawyers and architects enforced by tort law were created in part to make up for the lack of

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Presumably, the New York courts have concluded that even a sophisticated party who contracts for the provision of services is less able to bargain for similar guarantees of a satisfactory performance.

25 A service contract containing such express warranties would be treated differently from a contract for the sale of goods only in that the U.C.C. will not govern a court's interpretation of disclaimers of express warranties. However, in construing a contract for services, courts are free to reason by analogy to U.C.C. § 2-316(1). Moreover, it is unlikely that a substantially different outcome would result from the application of traditional common law contract principles.

sophistication and bargaining power of those seeking these professional services." 681 F.Supp. at 290; *see also Flinkote,* 678 F.2d at 949-50 (finding no reason to except contractors or other professionals from Georgia economic loss rule).

The Supreme Court emphasized in *East River* that in a *commercial* context there are rarely disparities in the bargaining power of the parties that would justify the imposition of such extracontractual duties. 476 U.S. at 872-73, 106 S.Ct. at 2302-03. Like the court in *PPG Industries,* we find this to be equally true where the parties to a contract for services are sophisticated commercial entities, "adept at negotiating complex agreements and allocating risks between them." 681 F.2d at 290; *see also* Note, *Privity Revisited, supra,* at 532-39 (arguing that where parties are of equal bargaining power, as in most commercial cases, the parties themselves are best able to allocate the risk of defects).

Hvide and Occidental are both sophisticated commercial actors, capable of anticipating and allocating the risk of the type of economic loss that occurred in this case, and of insuring against the possibility that such losses may not be recovered in a breach of warranty or contract action. There is no reason for society to presume that a commercial entity such as Occidental "needs special protection." *East River,* 476 U.S. at 870, 106 S.Ct. at 2301; *see also* Note, *Privity Revisited, supra* at 532-39. Whether the

negligence alleged is in the performance of a contract for services, or in a contract for the sale of goods, the resulting economic loss "is essentially the failure of the purchaser to receive the benefit of its bargain--traditionally the core concern of contract law." *East River,* 476 U.S. at 870, 106 S.Ct. at 2301.

[5] We do not hold that a tort cause of action may *never* be stated in admiralty when the only damages sought are economic.[26] *Id.* at 871 n. 6, 106 S.Ct. at 2302 n. 6. We hold only that a plaintiff may not recover purely economic losses on a theory of negligent performance of a contract for professional services when the services were rendered as a part of the manufacture or construction of a product. That is, a party that provides professional services as part of the manufacture or construction of a product

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26 The Supreme Court left open the possibility that a party not in privity with the defendant could recover purely economic damages on a theory of negligent performance of a contract for professional services. 476 U.S. at 871 n. 6, 106 S.Ct. at 2302 n. 6 (citing *Ultramares v. Touche,* 255 N.Y. 170, 174 N.E. 441 (1931) (allowing third party to recover economic loss resulting from negligent accounting)). That possibility, however, may be largely foreclosed by *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303, 309, 48 S.Ct. 134, 135, 72 L.Ed. 290 (1927) ("as a general rule, at least, a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong"). See *id.*

has no duty in maritime tort, independent of its contractual obligations, to prevent the product from injuring itself.[27] See *id.* at 876, 106 S.Ct. at 2304.

To hold otherwise would allow a plaintiff who contracts separately for "services" related to the manufacturing process--such as the design of the product or the supervision of the contract work--to recover in tort for purely economic losses from the provider of those services while *East River* would bar any similar recovery in cases in which those same services are performed by the manufacturer itself.[28]

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27 This rule applies only to parties who are in privity. We do not decide whether a party not in privity with the defendant may recover in negligence, *see supra* note 26.

28 Under New York law, the economic loss rule applies only to the sales components of a contract and the courts appear willing to parse a single contract to determine the extent to which the party may recover economic loss in tort. *Consolidated Edison,* 567 F.Supp. at 366 n. 12 (whether contract is essentially one for goods or services for purposes of determining applicable statute of limitations not dispositive of extent to which claims for economic loss are cognizable in tort: economic loss may be recovered on negligence theory only to extent that claims relate to service component of contract).

East River, however, appears to foreclose this approach. With respect to the plaintiff's allegation that the defendant, "as part of the manufacturing process," negligently supervised the installation of a component part, 476 U.S. at 861, 106 S.Ct. at 2297, the Court simply concluded that the defendant "owed no duty under a products-liability theory based on negligence to prevent the product from

Creating an exception to the economic loss rule for professional services when those services are

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injuring itself." *Id.* at 876, 106 S.Ct. at 2304. The Court cites as support two cases that declined to except services rendered as part of a manufacturing or construction contract from the economic loss rule: *S.M. Wilson & Co. v. Smith Int'l Inc.*, 587 F.2d 1363, 1372 (9th Cir.1978) (applying California law), and *Flinkote*, 678 F.2d at 950 (applying Georgia law). The Court therefore implicitly rejected the notion that the service component of a manufacturing contract could be segregated for purposes of the economic loss rule.

In *Republic Steel Corp.*, the Seventh Circuit, applying Illinois law, took a different approach. The court refused to segregate the service component of a contract for the engineering, design, sale, and installation of two furnaces as well as for purchase agency services. 785 F.2d at 182. Finding the contract to be primarily for the sale of goods, the court found it unnecessary to decide whether the Illinois economic loss rule applied to service contracts. *Id.* at 182 n. 13. Consequently, if there were an exception to the economic loss rule, it would apply only to contracts that were *predominantly* for services. *Flinkote*, which is cited in *East River*, held that construction contracts, which are generally held to be predominantly for services, were not excepted from the economic loss rule. 678 F.2d at 949-50.

We do not think that the Supreme Court would treat hybrid sales-service contracts in which services predominate any differently than the hybrid contract at issue in *East River*. Indeed, we effectively refused to do so in *Shipco* in which we applied the economic loss rule to tort claims against a shipbuilder--even though contracts for the construction of a vessel are hybrid sales-service contracts in which services arguably predominate. *See also Gulf Boat Marine Services, Inc. v. George Engine Co.*, 659 F.Supp. 6 (E.D.La.1986)

are exercised "only in the process of manufacturing or constructing a product" would "effectively eviscerate the economic loss rule" adopted in *East River*. *See Flinkote,* 678 F.2d at 950.

[6] We conclude then, that following *East River,* Occidental's negligence claims against Hvide are not cognizable in maritime tort. This holding does not, however, eliminate our jurisdiction over the claims remaining in this case. We may, within our discretion, retain jurisdiction over the pendent contract claims that would not otherwise be within the admiralty jurisdiction if "considerations of judicial economy, convenience and fairness to litigants" would be served by doing so.[29] *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); *Ingram Corp. v. J. Ray McDermott & Co.,* 698 F.2d 1295, 1320 (5th Cir.1983).

(applying *East River* rule to a case including a claim that seller was negligent in repairing defective engine). For the reasons set forth above, we conclude that the intent of *East River* can be given effect only by recognizing a bright-line rule that extends the economic loss rule to all service contracts--whether "purely" for services or predominantly for services--where the services are rendered as part of the manufacture or construction of a product and the only injury alleged is to the product itself.

29 It is not disputed that the negligence claims and the contract claims arise from "a common nucleus of operative fact." *Gibbs,* 383 U.S. at 725, 86 S.Ct. at 1138.

Prior to *East River,* plaintiffs' negligence claims were, under the law of this circuit, clearly cognizable in maritime tort. *Jig the Third Corp. v. Puritan Marine Insurance Underwriters Corp.,* 519 F.2d 171, 175-76 (5th Cir.1975). *East River,* which effectively overruled the Fifth Circuit rule, *Shipco,* 825 F.2d at 927, was decided two weeks after the district court had rendered its decision in this case, at the conclusion of a three and one half month bench trial. "Considerations of judicial economy, convenience and fairness to the litigants" thus weigh heavily against dismissing the pendent claims at this late date.[30] Accordingly, we will retain jurisdiction over the remaining claims.

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30 The Supreme Court emphasized in *Carnegie-Mellon Univ. v. Cohill,* --- U.S. ----, ---- 108 S.Ct. 614, 618, 98 L.Ed.2d 720 (1988), that "a federal court's determination of state-law claims could conflict with the principle of comity to the States." Thus,

> [w]hen the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its earlier stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.

Id. 108 S.Ct. at 619. Given the advanced stage of these proceedings and the amount of judicial resources that are necessarily consumed in trying a case as cumbersome as this, we think that the balance of factors weighs clearly in favor of retaining jurisdiction over the pendent claims in this case.

We turn now to the district court's resolution of those claims.

B. Did the district court err in finding that Avondale and Hvide breached their contracts by failing to deliver a properly mated and seaworthy vessel and that this was the sole cause of the sinking of the Oxy Producer?

[7] After a lengthy bench trial, the district court concluded that the Oxy Producer had not been mated in accordance with the plans and specifications and that this failure had rendered the vessel unseaworthy on delivery. The district court found that Avondale breached its Construction Contract by failing to comply with the plans and specifications[31] and that

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31 Article II(a) of the Construction Contract provides that:

> The Contractor, at its own risk and expense, shall furnish all plant, facilities, working plans, labor, materials, supplies and equipment, and shall perform all work required under this Construction Contract and the Vessel Plans and Specifications to construct, launch, outfit, test and *deliver the Vessel in accordance with the Vessel Plans and Specifications* as defined in Article I hereof; and shall further, at its own risk and expense, do everything required of the Contractor by this Construction Contract and the Vessel Plans and Specifications. (emphasis added).

Hvide had breached its Supervision Agreement by failing to insure that the plans and specifications were followed.[32] The district court also held that the

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Article XVI(a) provides that:

> a dock trial and a sea trial shall be *held in order to determine whether the Vessel and its machinery and equipment are in proper working order and in accordance with the requirements of this Construction Contract, the Vessel Plans and Specifications* and requirements of the Regulatory Agencies. (emphasis added).

The district court also held that the Construction Contract contained an express warranty of seaworthiness which Avondale also breached. That issue is addressed below in Section D, and the relevant language from the specifications is set out *infra* at note 46.

32 Section 4(c) of the Supervision Agreement provides that:

> 4. *Design*
>
> (c) The Supervisor and HMI further jointly and severally warrant that *the Vessel, if constructed by the Contractor in accordance with the Construction Contract and the Plans and Specifications, (i) will be complete and seaworthy, (ii)* will be suitable for the carriage of superphosphoric acid from ports of the United States to the Soviet Union and for the carriage in worldwide service of petroleum products or any other lawful cargo in bulk for which the Vessel and its tanks are suitable and *(iii) will perform in strict accordance with the Construction Contract and the Plans and Specifications.* (emphasis added).

Section 9 provides that:

> 9. *Plan Approval.* The Supervisor with HSI under the Subcontract shall review and shall cause Henry to review and approve all Contractor working lans and

improper mating of the vessel was the sole cause of the sinking of the Oxy Producer.

The district court's holding that the vessel was not properly mated is a finding of fact and will not be disturbed on appeal unless it is clearly erroneous. *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *McAllister v. United States,* 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20 (1954) (clearly erroneous rule applies to review of judgment of trial court sitting in admiralty). Issues concerning breach of contract and warranty are also treated as fact and are therefore subject to the clearly erroneous standard of review. *Automated Med. Laboratories v. Armour Pharm. Co.,* 629 F.2d 1118 (5th Cir.1980) (contract); *Noel v. Kline,* 325 F.2d 496 (5th Cir.1963)

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drawings and vendor plans and drawings according to the Construction Contract and the Plans and Specifications. The Supervisor shall also review any other plans and drawings submitted to it by the Owner or the Contractor for its review.

Section 10 provides that:

10. *On Site Inspection.* The Supervisor with HSI under the Subcontract shall provide qualified on-site supervisory staff which will perform construction inspection in respect of the construction of the Vessel. *Inspection will be made to assure that the Vessel is constructed in accordance with the Construction Contract and the Plans and Specifications and in a sound and workmanlike manner.* (emphasis added).

(contract); *Martin v. Xarin Real Estate,* 703 F.2d 883, 889 (5th Cir.1983) (warranty). Questions of negligence and causation are similarly treated as fact. *Kratzer v. Capital Marine Supply, Inc.,* 645 F.2d 477 (5th Cir.1981) (negligence); *Consolidated Grain & Barge Co. v. Marcona Conveyor Corp.,* 716 F.2d 1077 (5th Cir.1983) (causation).

"[A] finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson,* 470 U.S. at 573, 105 S.Ct. at 1511. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, [we] may not reverse even though convinced that had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.... This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical documentary evidence or inferences from other facts." *Id.* at 573-74, 105 S.Ct. at 1511.

For the reasons set forth below, we find no clear error in the district court's findings of fact.

1. *The Mating of the Vessel*

The district court noted that the Barge Specifications contained detailed instructions regarding the amount of contact required between the tug and the barge along the greenheart surfaces.[33] The

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33 The interconnection system of the Oxy Producer is designed to hold the tug and barge together as an integrated vessel. A tongue-shaped projection from the aft end of the barge is fitted into a wedge-shaped recess formed by the catamaran hulls of the barge, the crossover deck connecting the two hulls on the top and the ledges protruding from the lower portion of each of the two tug hulls. Greenheart (a very hard wood) bearing surfaces are placed on the top of the barge tongue and along the upper surface of each tug ledge to achieve a tight, customized fit between the tug and the barge. Two link arms (described as "suitcase latches") are used to engage and disengage the tug and barge and to maintain the longitudinal engagement of the tug on the barge tongue.

With each of the link arms latched down and in tension, the main link pin at the head of the arm pulls against and compresses a steel/neoprene sandwich ("bumper pad"). The compression of the bumper pad causes the neoprene to "flow" upward creating a bulge between the steel plates, indicating that the barge and tug are properly fitted to prevent movement.

Over time, the fit-up is intended to become tighter as the wedging action causes the steel structures to wear down the high spots on the greenheart. Ultimately, the contact along the greenheart will become uniform.

specifications also provided that the contractor should measure the contact to ensure that the fit was proper. It was undisputed, however, that the measurements taken by a Hvide employee, Robert Bibbo, revealed that the specified amount of contact had not been achieved at the final mating. The district court concluded that "the Oxy Producer was delivered with virtually no greenheart contact and large gaps between the tug and the barge along its greenheart surfaces. The vessel therefore was not constructed in accordance with the plans and specifications."

The court further found that the damage sustained by the vessel on September 12, 1981 "was caused solely by the poorly mated condition in which Avondale delivered the vessel. Had the vessel been delivered with the percentage of contact between the tug and the barge along the greenheart surfaces required by the plans and specifications, no significant movement would have developed and no damage would have been sustained." The court held that these same factors were responsible for the sinking of the tug on September 20.

Avondale and Hvide dispute the district court's holding on several grounds. Avondale argues first, that Bibbo's measurements may not have been taken under the conditions required by the Barge Specifications. Second, Avondale notes that the specifications prescribe the percentage of contact to be achieved before sea trials and not at the final mating. Third,

Avondale argues that because Hvide had extensive experience in the mating of ITBs, the district court should have deferred to Hvide's "interpretation" of the specifications. According to Avondale, the Oxy Producer's strong performance at sea trials was a better indication of the adequacy of the fit than were the measurements.

There is evidence in the record, however, to support each of the district court's findings. First, despite Avondale's post-hoc explanations for Bibbo's measurements, no evidence was presented that directly contradicted the measurements. The district court noted, moreover, that Carlton Ledet, the Avondale engineer responsible for mating the vessel, admitted that he did not take any steps to insure that there was sufficient contact before the vessel was delivered,[34] even though the adequacy of contact could readily be measured. Ledet went so far as to testify that had he known of Bibbo's measurements, he would have found the fit-up inadequate. Certainly the district court could find that these factors undermined the credibility of Avondale's post-hoc explanations for the unfavorable measurements.

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34 The tug and barge had been separated following the sea trials and were re-mated for delivery.

Second, although the specifications did not refer explicitly to the final mating, the court relied on the testimony of Roderick Hulla, a naval architect employed by J.J. Henry, who expressed the view that contact in the range of 85-90%, as provided in the specifications, was necessary to avoid rapid greenheart wear and sudden decompression of the linkage system. It was Hulla's opinion that failure to achieve the specified percentage of contact could cause the greenheart to wear down more rapidly, leading to a sudden loss of friction and relative movement between the tug and the barge. This theory supports the view that it was necessary to comply with the specifications at the final mating and not simply before the sea trials.

Hvide argues that Hulla's opinion regarding the consequences of a failure to comply with the specifications was pure speculation and did not provide an adequate basis for the court's finding that the improper mating of the vessel initiated the chain of events leading to the loss of the Oxy Producer.[35]

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35 Hulla's testimony relates to two separate points: first, that the specifications prescribed the percentage of contact necessary for the vessel to be safely mated on delivery and not simply the percentage of contact to be achieved before the sea trial, and second, that the improper mating *caused* the damage to the vessel and the sinking of the tug. We address the causation issue below.

The fact that the trial judge relied heavily on Hulla's testimony does not, however, render his decision clearly erroneous. The trial judge stated in his memorandum opinion that "[e]ach party's experts presented a different theory of the casualty. These theories varied widely and were often marred by the experts' obvious bias. Their tendency to be advocates and to protect the parties which called them often made their explanations obscure and illogical." The ability to assess the credibility of witnesses is at the heart of the trial court's function and is not a matter for the appellate court to second guess.

The fact that Avondale and Hvide are able to produce examples of testimony that appear to contradict the district court's findings does not, therefore, persuade us that the findings are clearly erroneous. In sifting through a vast array of competing evidence, the trial judge must evaluate the credibility of the witnesses and determine whose account of the events is most persuasive: "[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson,* 470 U.S. at 575, 105 S.Ct. at 1512.

The district court found Mr. Hulla to be the most "candid and responsive" of the expert witnesses. Hulla presented a "coherent and facially plausible" theory

that was supported by the evidence. We therefore find no clear error in the district court's reliance on Hulla's testimony as a basis for its findings that the vessel was not properly mated on delivery. We agree that Avondale and Hvide breached their contracts with Occidental in failing to insure that the vessel was properly mated.

2. *Alternative Theories of Causation*

We will next address the district court's finding that the improper mating of the vessel was the *sole* cause of both the damage to the Oxy Producer on September 12 and the sinking of the tug on September 20.

a. Failure to Adjust the Fit

Defendants argued at trial that the relative movement between the tug and the barge which began on September 12 was due to Occidental's failure to tighten the fit following the first voyage. Again, the district court relied on Hulla's testimony in rejecting this argument. Hulla explained that if the vessel had been properly mated at the outset, the greenheart would wear down and, with periodic tightening, would achieve nearly 100% contact. If, however, the vessel were not properly mated, the greenheart would wear down too rapidly, causing a relatively sudden loss of friction. Referring to the testimony of the crew, and to Bibbo's measurements, the district court found that the

events leading up to the sinking of the Oxy Producer were most consistent with the second theory. Bibbo's measurements disclosed that there was contact at only a few "high spots" in the greenheart, the situation that Hulla testified was likely to result in a sudden loss of friction. The theory was supported further by the crew's observations, prior to the 12th, that there had been significant bulges in the neoprene pads indicating that the pads were under compression and that the fit was satisfactory. Furthermore, the relative movement between the tug and the barge did not increase gradually, but increased suddenly when the vessel encountered heavy weather on September 12. The district court found that the sea conditions either knocked the vessel off of its high spots, or caused it finally to wear off of its high spots.

The defendant's objections to the district court's findings establish at most that there are several plausible explanations of the events. The district court's choice of one of several permissible views of the evidence cannot constitute clear error. *Anderson,* 470 U.S. at 574, 105 S.Ct. at 1511.

b. Negligence of the Captain

Avondale also argued at trial that even if the relative movement was caused initially by improper mating of the vessel, the negligence of the crew was an intervening or contributing cause in the damage sustained by the vessel on September 12 and in the

sinking of the tug on September 20. The district court held that Avondale failed to carry its burden of proving this affirmative defense with respect to the events of both September 12 and September 20.[36] The court's finding that the Captain acted reasonably in setting sail for the Azores in order to effect repairs is supported by the expert testimony and is not clearly erroneous.

The court also found that the Captain had been diligent in his attempts to obtain entry into the harbor at Ponta Delgada and had not acted unreasonably in setting out to sea on September 20.

While the harbor officials testified later that they would have permitted the Oxy Producer to enter the harbor if they had known that the vessel was in peril, the district court discounted this testimony as speculative. Given that the ultimate decision was not in the Captain's hands, and considering the range of factors that could affect the Harbor Master's decision whether to grant permission to enter, the district court's assessment of this evidence is certainly

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36 Although we held above that plaintiffs' negligence claims are not cognizable in maritime tort, the district court's findings on the issues of causation will be relevant to its determination of the foreseeability of damages stemming from Avondale's and Hvide's breaches of contract. Because the district court has not yet addressed this issue, we express no opinion as to the foreseeability of the events discussed in this section.

permissible.[37] The district court properly concluded that the mere possibility that the Captain *might* have obtained permission to enter the harbor if he had been more insistent did not establish that he was negligent.

Avondale next argues that the district court judge failed to apply the proper legal standard to judge the Captain's conduct on September 20. The district court invoked the doctrine of *in extremis* which holds that "where, without prior negligence, a vessel is put in the very center of destructive natural forces and a hard choice between competing courses must immediately be made, the law requires that there be something more than mere mistake of judgment by the master in that decision *in extremis.*" *Boudoin v. J. Ray McDermott & Co.*, 281 F.2d 81, 84 (5th Cir.1960).

Avondale argues that the circumstances confronting the Captain on September 20 were not sufficiently severe to warrant application of the *in extremis* doctrine and that the Captain's conduct should have been judged according to the ordinary "prudent seaman" standard.

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37 The officials initially denied entry because the Oxy Producer's draft was too deep for the harbor, creating a risk that the vessel would run aground and spill its hazardous cargo in the harbor. The only berth deep enough for the Oxy Producer was at the NATO quay, and permission to berth there was denied because NATO vessels were expected to arrive at the port before the repairs on the Oxy Producer could have been completed.

Avondale contends that a predicted storm does not constitute sudden peril because "it is the nature of the calling of the shipmaster to know the tempestuous forces of wind and tide and seas." *Boudoin,* 281 F.2d at 84 (application of *in extremis* doctrine inappropriate where storm tides from hurricane were predicted several days in advance).

The heavy weather predicted for September 20 was not, however, the only difficulty facing Captain Kanellos. His disabled vessel, which carried a hazardous cargo, had been denied entry into the harbor. Moreover, another storm moved into the area early on the 20th, exacerbating the heavy seas created by tropical storm Harvey.[38] While these factors may

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38 Avondale asserts that the district court erred in stating that the "norther" which exacerbated the poor weather conditions on the 20th was unforecast and also in stating that the storm reached the anchorage "just as the vessel weighed anchor." While there is testimony to the effect that the storm was forecast, the record is ambiguous as to when, precisely, these forecasts were made. It appears that the forecasts may not have been available until early in the morning of the 20th. Similarly, the record indicates that if the district court judge erred in his assessment of when the storm struck, he misstated the time by less than an hour. Thus, even if Avondale's assertions are correct, it appears that the Captain was confronted with rapidly changing weather conditions which would make the application of the *in extremis* doctrine all the more appropriate. We cannot conclude, then, that the district court erred, either in the legal standard that it applied

not have placed the vessel in "sudden peril," we think that the district court was justified in finding that the combination of these factors presented "a situation of sufficient peril and immediacy to require application of a standard of law different from the standard of ordinary maritime negligence." *M.P. Howlett Inc. v. Tug Michael Moran,* 425 F.2d 619, 623 (2d Cir.), *cert. denied,* 400 U.S. 833, 91 S.Ct. 67, 27 L.Ed.2d 65 (1970).

The district court properly evaluated the Captain's conduct in light of the principle that:

> The master of a vessel caught in an emergency where he is forced to choose between risky alternatives, is entitled to a wide range of discretion in deciding what to do, provided it is a reasonable exercise of current standards of nautical knowledge and skill under the circumstances. It does not become negligence because the decision he makes may later, in the light of subsequent events revealed through hindsight, be shown to have been wrong.

Esso Standard Oil S.A. v. S.S. Gasbras Sul, 387 F.2d 573, 580 (2d Cir.1967), *cert. denied,* 391 U.S. 914, 88 S.Ct. 1808, 20 L.Ed.2d 653 (1968).

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to the Captain's conduct, or in its ultimate conclusion that Avondale failed to carry its burden of proving that the negligence of the Captain was an intervening cause in the sinking of the Oxy Producer.

In arguing that Captain Kanellos was imprudent, Avondale relies on our decision in *Boudoin* in which we held that a shipmaster's decision to remain docked in the face of an oncoming hurricane, rather than sailing upriver to a more protected harbor, was imprudent. A central factor in our holding in *Boudoin*, however, was that there was no showing that the tug master evaluated his options critically and made a conscious decision that it would be safer to remain at the dock rather than moving his vessel to another port. 281 F.2d at 86. The experts who testified in *Boudoin* all agreed that a prudent seaman would not have remained docked in light of the weather forecasts. Furthermore, there was no evidence that taking the vessel upriver would have been dangerous before the onset of the hurricane was imminent. *Id.* at 87.

The instant case is readily distinguishable from *Boudoin*. First, there is ample evidence that Captain Kanellos carefully considered his options (none of which could be guaranteed to succeed) and made a conscious decision that the risk of dragging anchor, running aground, and spilling the vessel's hazardous cargo outweighed the risk of attempting to maneuver the vessel away from the breakwater. Second, the experts who testified at trial did not agree on one

prudent course of action.[39] Finally, at least one expert agreed with Captain Kanellos that remaining at anchor could have been dangerous.[40]

The district court found that the expert testimony established, at most, that another course of action *might* have been successful and that this was not enough to establish that the Captain's actions had been unreasonable under the circumstances. We agree. "The standard of judging the exercise of prudent seamanship here was tempered by the requirement for decision under very difficult, abnormal circumstances and the error, if there was error, was not negligence." *Tug Michael Moran,* 425 F.2d at 623 (citations omitted). The district court did not err in holding that Avondale failed to establish that the imprudence of the Captain was an intervening or contributory cause in the loss of the Oxy Producer. The district court must, however, decide whether the events discussed in this section were foreseeable for purposes of determining

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39 The experts suggested a number of alternatives, including declaring an emergency and requesting standby tugs, dropping two anchors instead of one, and going to sea but staying close to the shoreline. The experts disagreed among themselves, however, as to the relative merits of each of these options.

40 The district court felt that the other experts discounted too readily the Captain's concern that the vessel could run aground and spill its hazardous cargo if it remained at anchor.

damages for breach of contract. *See supra note 36; Skibs A/S Gylfe v. Nat'l. Cargo Bureau Inc.*, 438 F.2d 803, 805 n.1, 807-08 (6th Cir.1971) (distinguishing "superceding" and "intervening cause" as used in tort from "foreseeability" in determining damages for breach of contract).

c. Negligence or Breach of Contract by Henry and Victoria

The district court also rejected the contention that the cause of the damage sustained by the Oxy Producer on September 12 was the defective design and manufacture of the interconnection system as a whole and the bumper pads and link arms in particular. The district court found that this theory was inconsistent with the physical evidence, with the testimony of every other expert in naval architecture and marine engineering, with the crewmembers' testimony regarding the fore and aft direction of the movement between the tug and barge, and with the fact that no lateral movement appeared before September 12. Again, we find no clear error in the district court's assessment of the evidence.

Having concluded that the sole cause of the damage to the Oxy Producer was the improper mating of the vessel, the district court held that Henry and Victoria were not liable to the plaintiffs for any damage to the Oxy Producer. Because we find no clear error in

the district court's findings of causation, we agree with this conclusion. However, we address below in section G the propriety of dismissing Henry and Victoria from the lawsuit in light of the additional claims regarding the Oxy Producer's sister ships--the Oxy Grower and the Oxy Trader.

We affirm the district court's finding that both Avondale and Hvide breached their contracts with Occidental by failing to deliver a properly mated and seaworthy vessel. We furthermore affirm the district court's holding that the improper mating of the vessel was the sole cause both of the damage sustained by the Oxy Producer on September 12, and of the sinking of the tug on September 20.

C. Was Hvide's acceptance of the vessel binding on Occidental?

[8] Avondale contends that even if the loss of the Oxy Producer was caused by the improper mating of the vessel, Hvide's acceptance of the fit-up was binding on Occidental because the Supervision Contract vested Hvide with the power to accept or reject work or materials provided by Avondale. Avondale essentially argues that Hvide's acceptance of the vessel insulated Avondale from liability for any deficiencies in its own work. This argument is implausible. While Hvide was engaged to supervise the construction of the vessel, Avondale undertook an independent contractual obligation to construct the vessel according to the plans and specifications. *See supra* note 31.

The district court correctly found that Hvide had no actual authority to unilaterally modify the requirements of the plans and specifications[41] in a fashion that would be binding on Occidental because the Supervision Agreement expressly provided that Hvide was an independent contractor.[42]

Avondale notes, however, that this holding did not necessarily dispose of the question whether Hvide had apparent authority to bind Occidental. The two inquiries are distinct:

> While actual authority is the result of the principal's consent manifested to the agent, *apparent* authority is the result of consent manifested to the third party. The apparent authority for which a principal can be held

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41 We note that Avondale does not argue that Hvide actually directed Avondale to deviate from the plans and specifications. Rather, Avondale's contention is that by accepting the vessel when it was not mated in accordance with the plans and specifications, Hvide implicitly modified the plans and specifications.

42 Section 2 of the Supervision Agreement provides:

> 2. *Independent Contractor.* The Supervisor shall perform all of the work specified in this Agreement as an independent contractor, and, except as expressly contained in this Agreement, nothing shall be deemed to constitute the Supervisor and/or its employees or consultants as the agents of the Owner for any purpose whatsoever. Except as expressly provided herein, the Supervisor shall have no authority to incur any obligations, contractual or otherwise, in the name of the Owner or for the account of the Owner.

> liable must be traceable to him; it cannot be established by the unauthorized acts, representations, or conduct of the agent.

Strip Clean Floor Refinishing v. N.Y. District Council Brotherhood of Painters, 333 F.Supp. 385, 396 (E.D.N.Y.1971). Thus, Hvide's acceptance of the mating of the vessel would be binding on Occidental only if Occidental represented to Avondale that modifications of the plans and specifications by Hvide would be binding on Occidental and would relieve Avondale of its independent obligation to follow the plans and specifications.

A third party in Avondale's position may not assume the existence of such authority. Rather, a party who does business with an agent does so at his or her own peril: "[T]he principal will not be bound by the act of his agent in excess of his actual authority where the party doing business with the agent knows the extent of the latter's authority, or *where the facts and circumstances are such as to put him on inquiry as to the power and good faith of the agent.*" *Id.* (emphasis in original); *Legal Aid Soc'y of N.E.N.Y. v. Economic Opportunity Comm'n of Nassau,* 132 A.D.2d 113, 521 N.Y.S.2d 833 (1987) (party dealing with an agent must make necessary effort to discover actual scope of agent's authority). The circumstances of this case indicate that Avondale should have taken steps to confirm the scope of Hvide's authority. It was clear from the terms of

the Construction Contract that any deviation from the plans and specifications would expose Avondale to liability. The contract provides that Avondale should confer with the "Purchaser"--Occidental-- in the event that it encountered any "discrepancy, error, omission or lack of clarity in the Vessel Plans and Specifications" and that any work performed by Avondale based on a "discrepancy, error, omission or lack of clarity" about which Avondale knew or should have known would be at Avondale's own risk unless Avondale had first received clarification from Occidental. In light of these factors, any reliance by Avondale on Hvide's "apparent" authority to bind Occidental by accepting work not in conformity with the plans and specifications, with no attempt to confirm that such deviations were acceptable to Occidental, was manifestly unreasonable and unjustified.[43]

We conclude that the district court properly found that Hvide's acceptance of the vessel was not binding on Occidental and therefore did not relieve Avondale of liability for its own breach of contract.

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43 Avondale's argument is particularly weak in light of the district court's holding which indicates that the improper mating of the vessel did not stem from any conscious modification of the plans and specifications, but from Avondale's and Hvide's negligence in failing to insure that the plans and specifications were followed.

D. Avondale's Liability under the Construction Contract

The district court found that the specifications for the tug and the barge contained an express warranty that the vessel would be seaworthy on delivery which was incorporated into the Construction Contract[44] and that this warranty was not disclaimed or subject to the provisions limiting Occidental's remedies or Avondale's liability. The district court then found that Avondale breached both its express warranty that the vessel would be constructed in accordance with the plans and specifications and its warranty that the vessel would be seaworthy upon delivery.

Avondale maintains first that the language in the plans and specifications referring to seaworthiness does not create an express warranty, and second, that if there is a warranty of seaworthiness, it is subsumed in the guarantee deficiency clause of the contract and is therefore subject to the exclusive remedy of repair and replacement.

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44 Article III of the Construction Contract provides that the plans and specifications "are hereby made a part of this construction contract with the same force and effect as though herein set out in full."

The parties agree that the Construction Contract is governed by New York law. It is unclear whether, under New York law, contracts for the construction of a vessel are subject to the U.C.C. *Compare In re American Export Lines,* 620 F.Supp. at 515 (contract for the construction of a vessel is predominantly for services and is therefore not governed by the U.C.C.) with *Silver v. Sloop Silver Cloud,* 259 F.Supp. at 191 (applying U.C.C. to contract for construction of a vessel). Because our conclusions would be the same under either the New York U.C.C. or New York common law, we do not decide this issue.

1. *Warranty of Seaworthiness*

[9] Under New York law, "a warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely."[45] *Pittsburgh Coke & Chemical Co. v. Bollo,* 421 F.Supp. 908, 928 (E.D.N.Y.1976), *aff'd,* 560 F.2d 1089 (2d Cir.1977). We agree with the district court that the language in the specifications constituted an express

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45 Section 2-313(1)(a) of the U.C.C. provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." 1 U.L.A. 311 (1976 & Supp.1988). We hold that the warranty of seaworthiness is an express warranty under either New York common law or the New York Uniform Commercial Code.

warranty that the vessel would be seaworthy on delivery[46] and that the warranty is incorporated into the Construction Contract by Article III(a) of the contract. The language of the specifications indicates that the object of the contract work is the building of a seaworthy vessel.

2. *The Guarantee Deficiency Clause*

[10] We find, however, that the warranty of seaworthiness is subsumed in the guarantee deficiency

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46 The Tug Specifications provide that "[t]he builder shall be responsible for the construction, using good shipbuilding practices, of a complete and fully documented *seaworthy vessel suitable and ready for the service intended* in accordance with the requirements of these specifications."

Similarly, the Barge Specifications provide that "[t]he intent and spirit of these specifications is that the contractor shall deliver the vessel in a *seaworthy and safe condition and ready for service.*"

In addition, both the Barge and Tug Specifications state that:

> Should there be any errors or omissions in these specifications or in the Contract Guidance Plans (listed herein) *that would affect the construction of a complete and seaworthy vessel in accordance with good shipbuilding practice,* the Contractor shall correct such errors as part of the Contract Work with no increase in the Contract Price.

clause.[47] "Guarantee Deficiency" is broadly defined as:

> [A]ny weakness, deficiency, failure, breaking down or deterioration in workmanship or material produced or furnished by the Contractor in performing the Contract Work or any failure of any equipment, machinery or material produced or furnished by the Contractor or a vendor or subcontractor of the Contractor to function as prescribed by the Vessel Plans and Specifications.

Seaworthiness is a *qualitative* statement which may mean something more than the failure of the contractor to comply with the plans and specifications: not every such failure would render the vessel unseaworthy.[48] Thus, a deficiency that causes the vessel to be unseaworthy may be more serious than one that does not.[49] Nevertheless, the plain language of

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47 Unless the district court's interpretation of a contract is based upon consideration of extrinsic evidence regarding, for example, the intent of the parties, the construction of a contract is a question of law and is not subject to the clearly erroneous rule. *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483, 486 (5th Cir.1983).

48 A vessel may be "unseaworthy" when, among other things, it is not constructed so that it is fit for its voyage. *In re Gulf & Midlands Barge Line, Inc. v. The Tug Ramrod*, 509 F.2d 713, 721 (5th Cir.1975) (meaning of term in marine insurance contract).

49 Of course, a vessel may be considered unseaworthy due to any number of defects that are not sufficiently serious to cause the vessel to sink.

the guarantee deficiency clause sweeps broadly to include deficiencies of varying degrees of severity.[50] Looking to the plain language of the contract, we cannot conclude that "any ... deficiency" does not include those deficiencies which render the vessel unseaworthy.[51]

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50 The district court's interpretation of the guarantee deficiency clause as a one year warranty of workmanship and materials, independent of the warranty that the vessel would be seaworthy upon delivery, is not supported by the language of the contract. While the guarantee period begins upon delivery, the guarantee deficiency clause includes deficiencies that "appear or [are] discovered" during the guarantee period. This necessarily encompasses deficiencies which occurred before delivery but were not discovered until after delivery--including deficiencies that would have made the vessel unseaworthy on delivery.

51 The guarantee deficiency clause is therefore similar to a warranty that the goods will be of the quality and kind described in the contract-- that is, the vessel will be seaworthy upon delivery. A defect that is discovered after delivery would indicate that the product, when delivered, was not of the quality and kind described in the contract. Despite this temporal consideration, however, the buyer's remedies may still be limited by a one-year warranty to repair or replace defective parts or workmanship.

The district court's finding that the vessel had not been mated in accordance with the specifications falls precisely within the definition of guarantee deficiency: Avondale's failure to mate the vessel properly was a "deficiency ... in workmanship ... in performing the Contract Work."

The fact that the contract narrowly restricts the remedies that are available for guarantee deficiencies to "repair or replacement" does not render this clause unconscionable, nor should it prompt a court to engage in tortured interpretation of the contract:[52]

> Within the framework of this commercial transaction the Court perceives no valid legal reason why [the plaintiff] should not be held to the clear and express terms of the written agreement between the parties. Warranty and limitation of liability clauses such as found in the present contract, which restrict [the plaintiff's] remedies to the repair and replacement of non-conforming parts and limit [the defendant's] liability, regardless of its negligence in causing such nonconformities, are valid and enforceable and have been consistently upheld by the courts.

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52 The district court based its conclusion that the warranty of seaworthiness could not be subsumed in the guarantee deficiency clause in part on the concern that such an interpretation would compel the result that if a defective $1 bolt rendered the vessel unseaworthy and caused the vessel to sink, Avondale would have been obligated only to replace the $1 part.

American Elec. Power Co. v. Westinghouse Elec. Corp., 418 F.Supp. 435, 453 (S.D.N.Y.1976) (quoting *Potomac Elec. Power Co. v. Westinghouse Elec. Corp.*, 385 F.Supp. 572, 575 (D.D.C.1974), *rev'd and remanded on other grounds*, 527 F.2d 853 (D.C.Cir.1975)). The warranty of seaworthiness is no different from other express warranties of the quality or performance of goods which have, in other cases, been subject to a similar limitation of remedies.

a. Failure of the Exclusive Remedy

[11] Plaintiffs maintain, however, that even if the warranty of seaworthiness is subsumed in the guarantee deficiency clause, the exclusive remedy provision is inoperative because circumstances have caused the remedy to fail of its essential purpose within the meaning of section 2-719(2) of the U.C.C. Section 2-719(2) provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." 1A U.L.A. 493 (1976 & Supp.1988) The official comment provides further that "where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article." U.C.C. § 2-719 comment 1, 1A U.L.A. 494.

Occidental argues that the purpose of the remedy was to bring the vessel into conformity with the plans and specifications. Because Avondale's initial failure to mate the vessel in accordance with the plans and specifications caused the tug to sink, the repair and replacement remedy was ineffective--the flaws in the mating of the vessel could not be corrected.

As noted above, it is not clear whether the Construction Contract is governed by the New York Uniform Commercial Code. It is therefore unclear whether section 2-719(2) of the U.C.C. is directly applicable.[53] However, even if we were to reason by analogy to the U.C.C., we conclude that the express terms of the contract, limiting Occidental's recovery to the cost of repairing or replacing guarantee deficiencies, are effective.

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53 This ambiguity is problematic because the official comment to this section states that "[i]f the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract." U.C.C. § 2-719 comment 1, 1A U.L.A. 494. Thus, if the contract is not governed by the U.C.C., it is not clear that the parties should be made, simply by force of analogy, to "accept the legal consequences" of making a contract subject to these particular code provisions.

On the other hand, the contract provisions at issue here are identical to those addressed in section 2-719.

Where a seller "has been guilty of willful and dilatory behavior in not honoring" its promise to repair or replace, there is no doubt that the remedy has failed of its essential purpose. *See, e.g., Computerized Radiological Services, Inc. v. Syntex Corp.*, 595 F.Supp. 1495 (E.D.N.Y.1984), *aff'd in part, rev'd in part*, 786 F.2d 72 (2d Cir.1986); *American Electric*, 418 F.Supp. at 435-54. In such cases, the seller has not only failed to deliver goods conforming to its warranties, it has also breached its promise to repair, or attempt to repair, the defects.

Courts are divided on the question whether the seller's *inability* to repair causes the remedy to fail of its essential purpose. On one hand, several courts have concluded that a seller's inability to repair or replace defective parts or workmanship constitutes a failure of the remedy. *Consolidated Data Terminals, Inc. v. Applied Digital Data Systems*, 708 F.2d 385, 392 (9th Cir.1983); *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363, 1375 (9th Cir.1978). On this view, the buyer has bargained to receive a product of a particular quality. If repairs *cannot* bring the product into compliance with the warranty, the remedy has failed of its essential purpose, the buyer has been deprived of the substantial benefit of its bargain, and the buyer must have recourse to alternative remedies.

Other courts have found, however, that the seller's inability to repair or replace does not cause the remedy to fail. Rather, a contract may anticipate the possibility that repairs would not be sufficient to correct all defects. *Potomac Electric*, 385 F.Supp. at 578-79; *U.S. Fibres, Inc. v. Proctor & Schwartz, Inc.*, 358 F.Supp. 449, 457, 465 (E.D.Mich.1972), *aff'd*, 509 F.2d 1043 (6th Cir.1975). On this view, the buyer has bargained for the seller's efforts to bring the product into conformity with the warranties. The risk that such efforts would not succeed has been allocated to the buyer.

The instant case differs from both lines of cases in that there was no *opportunity* to effect repairs because the sinking of the tug made both actual or attempted repairs by Avondale--or anyone else--impossible. Assuming that these circumstances caused the remedy to fail of its essential purpose to *actually* repair guarantee deficiencies, our inquiry is not complete. The Construction Contract further provides that "[t]he Contractor shall not be liable to the Purchaser for any damage to the Vessel or its equipment or cargo or other property of such purchaser or for consequential damages of the Purchaser arising out of any such Guarantee Deficiency." Avondale argues that this clause operates as an independent limitation of its liability--effectively allowing Occidental to recover only the cost of repairing guarantee deficiencies.

b. Limitation of Liability

It is well established that under New York law the failure of a remedy to achieve its essential purpose does not render ineffective all other limitations of liability: "A better reading is that the exclusive remedy clause should be ignored; other clauses limiting remedies in less drastic manners and on different theories would be left to stand or fall independently of the stricken clause." *Computerized Radiological Services,* 595 F.Supp. at 1510; *American Electric,* 418 F.Supp. at 457.

Whether a separate limitation of damages will survive the failure of the exclusive remedy will frequently depend on whether the damages excluded by the challenged clause have resulted from the seller's willful or dilatory conduct in failing to comply with the remedy provision. Indeed, most New York cases have upheld a separate limitation of consequential damages when those damages stem from the seller's inability to repair rather than from a refusal to repair. This case, however, presents a third situation because "the [direct and] consequential damages suffered precede[d] the failure of the limited remedy and bear no relation to it." Eddy, *On the "Essential" Purpose of Limited Remedies: The Metaphysics of UCC Section 2-719(2),* 65 Calif.L.Rev. 28, 88-89 (1977). That is, the direct and consequential damages suffered by Occidental are not due to Avondale's failure to repair the guarantee deficiency. Rather, it is the extent of damage--the sinking of the tug--that caused the remedy to fail.

The facts of this case resemble those of *Henningsen v. Bloomfield Motors,* 32 N.J. 358, 161 A.2d 69 (1960), a pre-code case discussed in Eddy's article. In Henningsen, a defective part caused the plaintiff's automobile to swerve from the road injuring the plaintiff and damaging the car. The contract limited remedies to the repair or replacement of defective parts and excluded consequential damages. Eddy concludes that when the consequential damages do not flow from the failure to repair, but precede any opportunity to repair, the limitation of consequential damages should not be invalidated as having failed of its essential purpose--although the limitation might properly be considered unconscionable. *Id.* This case differs from *Henningsen,* however, in two respects: First, Henningsen was a classic consumer case. Second, the Construction Contract would allow recovery of the *cost* of repair.

It is by no means clear that limiting Occidental to recovery of the *cost* of repairs would be unconscionable or deprive it of an adequate remedy. Whether application of the clause would deprive Occidental of the substantial value of its bargain depends manifestly on what Occidental bargained *for*.

The cases discussed above, involving a seller's inability to repair, are instructive on this point. From these two lines of cases, it is clear that whether "circumstances" have caused a remedy to fail depends on whether the contract anticipated and allocated the risk that the exclusive remedy would not cure all

defects.[54] Under the first line of cases, the court has concluded that the parties did not anticipate and allocate the risk that repairs would be unsuccessful--thus, the remedy fails of its essential purpose. Under the second line of cases, the court has concluded that the parties did anticipate, and allocate to the buyer, the risk that the repairs might not be effective-- thus, the remedy does not fail of its essential purpose.

The question presented here is not simply whether the contract anticipates that efforts to repair may be ineffective, but whether it anticipates that repairs may be impossible.[55]

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54 This view is consistent with the purposes of section 2-719(2): "the subsection is not concerned with arrangements which were oppressive at their inception, but rather with the application of an arrangement to novel circumstances not contemplated by the parties." Eddy, *supra*, at 71 (quoting *1 State of New York Law Review Commission, Study of the Uniform Commercial Code* 584 (1955)).

55 The question whether circumstances caused the remedy to fail has been construed to mean whether circumstances *changed* so as to cause the remedy to fail. *Computerized Radiological Services*, 595 F.Supp. at 1510 (citing *Wilson Trading Corp. v. David Ferguson Ltd.*, 23 N.Y.2d 398, 297 N.Y.S.2d 108, 244 N.E.2d 685 (1968)). Thus, if no conduct by the seller is alleged to have caused the circumstances to change, we must consider whether the circumstances contemplated by the contract have in fact changed so as to make the remedy ineffective, or whether the circumstances alleged to have caused the remedy to fail were anticipated by the contract.

Although the circumstances which caused the repair remedy to fail had catastrophic results, those circumstances were not beyond the contemplation of the parties. The guarantee deficiency clause clearly recognizes the possibility that a deficiency could result in damage to the vessel and its cargo. The risk of such loss is allocated by the express terms of the contract to Occidental. If the damage to the Oxy Producer had been severe, but had not caused the tug to sink, the remedy would not have failed of its essential purpose and Avondale would be responsible, by the terms of the contract, only for the cost of repairing the underlying deficiency, not for any other damage *caused* by the deficiency--no matter how severe.

The fact that damage to the vessel caused it to sink, rendering the remedy of *actual* repair ineffective, does not require that the allocation of the risk of damage to the vessel be shifted to Avondale. The risk that the vessel would sink is only the most serious of the risks that the Construction Contract allocates by its plain terms to Occidental. While this allocation of risks may appear severe, it is not illogical.

One commentator has noted that "[a]s one moves into the realm of industry or commerce ... the goods sold become more complex and more frequently custom designed.... Where goods are not standardized or, in the extreme alternative, where they are experimental ... the reasonable expectations of the buyer become attenuated [and] the degree of risk imposed by an absolute construction of the repair duty becomes extensive." Eddy, *supra,* at 77, 80.

When the goods which are the subject of the contract are complex or innovative the contract may allocate the risk of defects differently than when the contract involves "standard" goods--such as automobiles. *Id.* at 80. Thus, in *American Electric,* the court emphasized that "the contract here in issue is not of the type entered into by the average consumer, but a commercial agreement painstakingly negotiated between industrial giants.... The rule that the agreed upon risk should not be disturbed is particularly appropriate where, as here, the warranted item is a highly complex, and in some ways experimental piece of equipment." 418 F.Supp. at 459.[56]

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56 Finding that there was a genuine issue of material fact regarding the seller's efforts to comply with the exclusive remedy, the court did not decide whether the remedy had failed of its essential purpose. The court relied on the factors outlined above in holding that in the event that the remedy did fail of its essential purpose, the clause limiting the seller's liability to "the price of the equipment [or] part on which such liability is based" was still effective. 418 F.Supp. at 459.

The court went on, however, to construe this provision as allowing full recovery of the purchase price in the event that the generator as a unit could not or had not been repaired to comply with the contract specifications. This, they found, would constitute an adequate remedy in the event that the remedy of repair and replacement was found to have failed of its essential purpose.

In the instant case, Avondale argues that because the design for the Oxy Producer was relatively novel, it was willing to assume only the most limited liability for possible defects. The contract reflects this allocation of risks. Occidental agreed that in the event of a guarantee deficiency, Avondale would be liable only for the cost of repairing or replacing deficiencies. It agreed that Avondale would not be liable for any damage to the vessel, its cargo, or its equipment, arising from such a deficiency. We will not disturb the agreed upon allocation of risks simply because the worst of those risks has materialized.

While this result may seem harsh, it is clear that two sophisticated commercial actors such as Avondale and Occidental could have allocated the risk of damage stemming from a guarantee deficiency differently. We note that the construction contract involved in *Shipco* provided that Avondale would be liable for damage to the vessel immediately caused by any guarantee deficiency. 631 F.Supp. 1123, 1126 n. 3 (E.D.La.1986) (quoting contract language) *aff'd,* 825 F.2d 925 (5th Cir.1987), *cert denied,* --- U.S. ----, 108 S.Ct. 1472, 99 L.Ed.2d 701 (1988). Under the terms of that contract, Avondale might have been liable for the loss of the vessel. Occidental, however, did not secure a similar promise with respect to the Oxy Producer.

Occidental and Avondale are "commercial giants" of equal bargaining power. Their lengthy negotiations produced a detailed contract of nearly 100 pages in length. We will not rewrite this contract to substantially alter the allocation of risks to which the parties have consented. *See American Electric,* 418 F.Supp. at 440 n. 2.

The district court should therefore determine the extent of the damages that Occidental may recover consistent with this holding.

E. Hvide's Liability under the Supervision Contract

We held above that under the economic loss rule adopted in *East River* the plaintiffs' negligence claim against Hvide is not cognizable in maritime tort. We therefore do not need to reach the issue whether the Supervision Contract limits Hvide's liability in negligence. The parties do not dispute that the Supervision Contract limits Hvide's liability for breach of contract to $5 million.

F. Joint and Several Liability

Because the district court has not yet determined the proportionate responsibility of Hvide and Avondale for the losses suffered by Occidental, and because our decision on appeal will affect the total amount of damages that can be recovered against each defendant, we decline to decide whether the imposition of joint and several liability is appropriate here. That question may

be addressed after the district court has conducted proceedings to determine the extent and allocation of the damages.

G. The Dismissal of Henry and Victoria

We affirmed above the district court's finding that the improper mating of the vessel was the sole cause of the sinking of the Oxy Producer and that there were no defects in the design or manufacture of the linkage system as a whole, or in the link arms or bumper pads. This holding, however, does not eliminate plaintiffs' claims regarding the sister ships. Following the sinking of the Oxy Producer, the Coast Guard revoked the certificates of inspection for the Oxy Producer's sister ships--the Oxy Trader and the Oxy Grower. After an inspection revealed damage in the linkage systems of the sister ships, parts of the linkage system were redesigned and replaced. Occidental sought to recover the losses it sustained in repairing the sister ships.

Although the district court's opinion states only that "Henry and Victoria are not liable ... for any damage suffered by the Oxy Producer," and does not address the sister ships explicitly, the court dismissed Henry and Victoria from the entire lawsuit.

Occidental contends that the district court's dismissal of Henry and Victoria was improper--at least with respect to the claims regarding the sister ships. While we affirm the district court's holding that Henry and Victoria are not liable for any damage to the Oxy

Producer, we do not think that the dismissal of Henry and Victoria was proper without specific findings regarding the sister ships. We therefore reverse the dismissal and remand to the district court for resolution of these claims consistent with our holdings in this case.

III.

The decision of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for determination of damages consistent with this decision, and for resolution of the claims regarding the sister ships.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EMPLOYERS INSURANCE OF WAUSAU, ET AL.	*	CIVIL ACTION
	*	NO. 82-4034 and
VERSUS	*	consolidated cases
	*	
AVONDALE SHIPYARD, INC., ET AL.	*	SECTION "G"

MEMORANDUM OF OPINION

This is the story of the ill-fated OXY PRODUCER which sank in the North Atlantic Ocean on September 20, 1981 during a storm off the coast of the Island of San Miguel in the Azores Archipelago.

I. THE PARTIES

The bareboat charterer[1], time charterer, and

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1 The vessel was constructed for Suwanee River SPA Finance, Inc. ("Finance"), a subsidiary of Occidental Petroleum Corporation. Upon delivery of the vessel, Finance assigned its rights under the Construction Contract to Hartford National Bank & Trust Company ("Hartford Bank") as title holder and trustee for General Electric Corporation of Georgia, the financing interest and beneficial owner. Hartford Bank, in turn, bareboat chartered the vessel to Suwanee River SPA Lines, Inc. ("Lines"), which sub-bareboat chartered it to Seabulk Transmarine II, Inc., which then time chartered the vessel to Suwanee River Chartering, Inc. ("Chartering").

insurers[2] of the OXY PRODUCER[3] (collectively, "the OXY plaintiffs")[4] brought these consolidated actions against the naval architect which designed the vessel, J. J. Henry Co., Inc. ("Henry"); the shipyard which constructed the vessel, Avondale Shipyard, Inc., and its guarantor, Ogden Corporation (collectively, "Avondale"); the manufacturer of certain component parts of the vessel, Victoria Machine Works, Inc.

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2 The insurers are Employers Insurance of Wausau representing certain American underwriters subscribing to Certificates Numbered 14880 and 14882 and certain underwriters at Lloyd's subscribing to Certificates Numbered 14880, 14882 and 14888. The insurers are subrogated to the claims of Lines and Chartering in the amount they paid in claims against the certificates providing coverage on the OXY PRODUCER.

3 The OXY PRODUCER was an integrated tug-barge composed of the tugboat OXY PRODUCER and the barge OXY 4102.

4 Occidental Chemical Agricultural Products, Inc. ("Chemical"), the manufacturer and distributor of certain products that the vessel was designed to transport, is also named as a plaintiff in these consolidated actions. At the April 9, 1986 pretrial conference for the trial on damages, plaintiffs' counsel abandoned any claim that Chemical had for loss sustained from the disruption of its business caused by the sinking of the vessel.

Suwanee River Lines, Inc. and Suwanee River Phosphate Lines, Inc., the bareboat charterers of the OXY PRODUCER's sister ships, the OXY TRADER and the OXY GROWER, are also named as plaintiffs in these consolidated actions. Their claims are discussed in connection with the damages phase of the trial.

("Victoria"); and the supervisors of the design and construction of the vessel, Seabulk Transmarine II, Inc., Hvide Marine International, Inc. and Hvide Shipping, Inc. (collectively, "Hvide").

Hvide, in its capacity as the operator of the vessel, also sued Henry, Avondale and Victoria (collectively the OXY plaintiffs and Hvide are hereafter "plaintiffs").

The OXY plaintiffs bring two claims against each defendant. First, they claim each breached certain contractual obligations that it undertook in connection with the construction of the vessel. Second, they claim that each negligently performed the contractual obligation it undertook in connection with the construction of the vessel. *See Jig The Third Corp. v. Puritan Mar. Ins. Under. Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 1429 (1976). The OXY plaintiffs argue that as a result of the defendants' breaches and negligence the vessel was unseaworthy when it was delivered and that its unseaworthiness was the sole cause of its sinking.[5]

Hvide, in its standing as a plaintiff, joins the OXY plaintiffs in certain of their tort claims against Henry, Avondale and Victoria.

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5 The OXY plaintiffs initially alleged numerous other causes of action. Before and during trial, all except the breach of contract and negligence claims were dismissed or abandoned and no other evidence was offered at trial on these other claims.

The defendants deny any liability. They argue that operational and navigational negligence of the vessel's captain and crew caused the sinking of the vessel. The defendants have each brought cross-claims against each other.

II. JURISDICTION

The Court has admiralty jurisdiction over the plaintiffs' tort claims because of their maritime character. 28 U.S.C. § 1333.[6] While contracts for the construction of a vessel are not maritime contracts and therefore claims for their breach are not cognizable in admiralty, actions based on negligent construction and design of a vessel will lie in admiralty if the negligence constitutes a maritime tort. *Walter v. Marine Office of America*, 537 F.2d (5th Cir. 1976); *Smith v. Pan Am Corp.*, 684 F.2d 1102 (5th Cir. 1982); *Moser v. Texas Trailer Corp.*, 623 F.2d 1006 (5th Cir. 1980).

The criteria for maritime tort jurisdiction has its modern roots in the so-called "locality plus" test enunciated by the United States Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland*, 93 S. Ct. 493 (1972). That is, the tort must occur on navigable waters and must bear a substantial relationship to traditional maritime activities. A maritime tort "occurs", for purposes of the locality requirement, where the alleged negligence has

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6 28 U.S.C. § 1333 provides in part:

> The district court shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction . . .

its effect rather than where the negligent acts or omissions take place. *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634 (5th Cir. 1985). Thus, the negligent conduct complained of in this case satisfies the locality requirement of maritime tort jurisdiction since the negligence had its effect when the vessel sustained its casualty in navigable waters in the North Atlantic.

In order to determine whether the alleged wrong bears a substantial relationship to traditional maritime activities, it is necessary to consider: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and the type of injury; and (4) traditional concepts of the role of admiralty law. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied sub nom. Chicot Land Co. v. Kelly*, 94 S. Ct. 1991 (1974). Here, the injured plaintiffs were performing traditional maritime activities -- commerce and trade -- at the time of the sinking. The vehicle involved was a unique ocean-going vessel "whose function was transportation across navigable waters, a traditional role of watercraft." *Id.*, at 526. The instrumentalities involved were integral parts of the vessel's design. The cause of the injury was a condition created solely to facilitate that design. The type of injury -- the sinking of the OXY PRODUCER -- is perforce maritime in nature. Finally, the traditional concepts of the role of admiralty law are not offended, and in fact are enhanced, by the exercise of jurisdiction in this case.

Pendent jurisdiction is exercised, upon the request of the parties, over the remaining claims in these actions, including the plaintiffs' contract claims.

III. THE VESSEL

The OXY PRODUCER and its barge the OXY 4102 (together referred to as "the OXY PRODUCER" or "the vessel") was a catamaran integrated tug-barge ("catug ITB"). A catug ITB is a tug and barge which are integrated into a single vessel. The tug boat has two catamaran hulls connected by a crossover deck ("tug crossover"). A ledge protrudes from the lower portion of each of the hulls. The after end of the barge ("barge tongue") is tapered to fit into a wedge formed by the hulls of the tug on each side, the tug crossover on the top, and the ledges on the bottom ("the wedge"). When properly constructed the tug and barge behave as a single unit. A catug ITB is designed to make transoceanic voyages in virtually any weather.

The essence of the catug ITB design is the fit of the barge tongue along its top and bottom surfaces into the wedge. To achieve the necessary fit, the top of the barge tongue is designed with a strip of greenheart wood ("greenheart")[7] running along its length on each side. Each ledge is also designed with a strip

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7 Greenheart is "a hard and strong wood originating from Guiana, highly resistent to the attacks of marine borers. It is useful in shipbuilding for all purposes where great strength and durability are required, as in rudder stocks." de Kerchove, *International Maritime Dictionary*, (2d ed. 1961).

of greenheart running along its upper surface. When the tug and the barge are properly mated, the greenheart on the top of the barge tongue fits along the steel underside of the tug crossover and the greenheart on the ledges fits along the steel underside of the barge tongue. The friction along the areas of greenheart to steel contact is designed to restrict relative movement of the tug and the barge to less than one-tenth of one inch.

The design of the OXY PRODUCER included additional features auxillary to the wedge fit integration of the tug and the barge.[8] First, there were four bumper pads located between the inside surface of the tug hulls and the sides of the barge tongue. These pads were constructed of rubber strips, or billets, sandwiched between a steel base plate welded to either the tug or barge hull and a steel face plate. Two of these pads were welded onto the after end of the barge tongue, one on each side. The other two pads were welded to the forward end of the tug hulls, one on each of the hulls' inside surfaces. The bumper pads were designed to restrict relative lateral movement of the tug and the barge. The pads were pre-loaded at 800 long tons of compression. The preload on the pads enabled them to work together at sea to absorb any excessive transverse load on the vessel from sea waves by alternately compressing and decompressing.

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8 These features are not general features of all catugs since, as catug technology has advanced, the features auxillary to the wedge fit have been improved.

Second, there were two "suitcase" type latching mechanisms ("link arms") connecting the deck of the tug crossover to the deck of the barge, one on each side of the center line. Each link arm consisted of a long metal member with a pin fitted through its end. The link arm was attached to support blocks ("pillow blocks") which were welded onto the deck of the cross-over. The pin lay in a cradle which was welded to the deck of the barge. The link arms locked down by means of hydraulic cylinders. When engaged, the link arms were designed to exert 847,000 pounds of tension pulling the barge and the tug together. The link arms served three functions. They drew the tug and barge together during mating, supplemented the wedge fit by restricting aft movement of the tug relative to the barge and assisted in disengaging the tug and the barge.

Third, there were two sets of metal plates ("thrust shims") welded on to the hull of the barge forward of the barge tongue and facing the tug crossover. The thrust shims were designed to fill the gap between the barge and the tug crossover.

The catug ITB design was patented by John Stevens in 1972. It was thereafter acquired by Hvide and its owners. The first two catug ITBs, the SEABULK MAGNACHEM and the SEABULK CHALLENGER were built in the mid 1970s.[9]

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9 These vessels had different auxillary features than the OXY PRODUCER. For example, the Seabulk vessels had hydraulic movable side wedges instead of the bumper pads that were installed on the OXY PRODUCER.

The OXY PRODUCER and its sister ships were only the second generation of catugs constructed. The catug design has continued to evolve and it is still very much in use.[10]

IV. CONSTRUCTION OF THE OXY PRODUCER

During the early 1970s, Occidental Petroleum Corporation ("Occidental")[11] embarked on a business venture to manufacture superphosphoric acid ("SPA") for export to the Soviet Union. As part of the venture, Occidental required special vessels to transport the dense and corrosive SPA across the Atlantic Ocean. Among various options, Occidental chose to construct three identical catug ITBs. The OXY PRODUCER was the second of these vessels.

Occidental formed a subsidiary, Suwanee River SPA Finance, Inc. ("Finance"), for the sole purpose of constructing the OXY PRODUCER. Finance entered into, had assigned to it or was a third party beneficiary of four major contracts in connection with the construction of the vessel. Finance contracted with Hvide to supervise the design and construction of the vessel ("Supervision Agreement"). Hvide, in

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10 The defendants offered expert testimony from the captain of the MOKU PAHU, a catug recently built with link arms equipped with gauges to measure their tension and with cradle assemblies which can be hydraulically adjusted at sea from the bridge.

11 Occidental Petroleum Corporation is the corporate parent of all the corporations with Suwanee names, e.g., Suwanee River SPA Lines, Inc.

turn, contracted with Henry to prepare the contract plans and specifications for the vessel ("Henry Agreement"). Hvide assigned the Henry Agreement to Finance. Finance then contracted with Avondale to construct the vessel ("Construction Contract"). Avondale entered into a subcontract ("Purchase Order") with Victoria to design and manufacture the bumper pads ("Purchase Order"). Finance was a third party beneficiary of the Purchase Order because Finance was named in it as the purchaser of the vessel for which the pads were being ordered. *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir. 1984), *cert. denied sub nom. Morial v. United Gas Pipe Line Co.*, 105 S. Ct. 434. Finance ultimately assigned its rights under the Supervision Agreement, the Henry Agreement and the Construction Contract to the OXY plaintiffs. The parties agree that each of these three contracts is governed by New York law and that the Purchase Order is governed by Louisiana law.[12]

1. HENRY AGREEMENT

Henry contracted to prepare the plans and specifications for construction of the vessel.[13] Henry also contracted to "review and approve all Contractor working plans and drawings and vendor plans and

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12 Supervision Agreement, section 24. Henry Agreement, general conditions ¶ 14. Construction Contract, article XXXII. Purchase Order, page 1.

13 Henry Agreement, ¶ 2(a).

drawings submitted in accordance with the approved plan schedule for conformance with the Contract Plans and Specifications.[14]

Henry warranted that the "Catug Design" had been fully incorporated into the plans and specifications.[15] Henry further warranted that each vessel, if constructed in accordance with the plans and specifications and the approved working plans, would be seaworthy.[16] Henry also warranted that it would perform its services in conformance with the highest professional standards and approved practices of the professions of naval architecture and marine engineering.[17]

The OXY plaintiffs' primary claim against Henry is that Henry breached its warranty that the plans and specifications and the approved working plans called out a seaworthy vessel. In particular, they claim that the bumper pads and link arms, as designed in the plans and specifications and working plans, were insufficient to restrict relative movement between the tug and the barge. The plaintiffs also claim

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14 Henry Agreement, ¶ 3.

15 Henry Agreement, ¶ 2(a).

16 Henry Agreement, ¶ 2(b), provides "Henry warrants that each vessel, if constructed by the Contractor in accordance with the approved working plans, to the extent approved by Henry . . . will perform in accordance with the Contract Plans and Specifications and that the tug will properly interfit and interlock with the barge."

17 Henry Agreement, ¶ 1.

that Henry was negligent in its performance of its contract. In particular, the plaintiffs claim that Henry failed to consult the Catug Patent, that Henry failed to conduct model tests and that Henry failed to follow up on the defects it noted during its plan review to insure that those defects were corrected.

2. AVONDALE CONSTRUCTION CONTRACT

Avondale contracted to construct the vessel in accordance with the plans and specifications prepared by Henry, including the furnishing of all plant, facilities, working plans, labor, materials, supplies and equipment necessary to complete the work.[18] Avondale also contracted to conduct trials and tests "sufficient to assure that the Vessel complies with the requirements of this Construction Contract and the Vessel Plans and Specifications."[19] In addition, Avondale contracted to repair or replace, at its own expense, any deficiency of its workmanship, material, equipment or machinery which arose within one year of the date of the vessel's delivery.[20]

Avondale warranted that the vessel would be constructed in accordance with the plans and specifications and that the vessel would be seaworthy upon delivery. The Tug Specifications, paragraph G1, provide that "the Builder shall be responsible for the

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18 Construction Contract, article II(a).

19 Construction Contract, article XVI(a).

20 Construction Contract, article XVIII(a).

construction, using good shipbuilding practices, of a complete and fully documented seaworthy vessel suitable and ready for the service intended, in accordance with the requirements of these specifications." The Barge Specifications section1(A) likewise provide "the intent and spirit of these specifications is that the Contractor shall deliver the vessel in a seaworthy and safe condition and ready for service." The Tug Specifications and the Barge Specifications are incorporated into the Construction Contract and are its essence.[21]

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21 Construction Contract, article III(a).

Avondale argues that this warranty in the plans and specifications is not incorporated into the Construction Contract because it conflicts with article XVIII(g) and article XXXVI of the Construction Contract and because article III(b) provides that the provisions of the Construction Contract prevail over conflicting provisions of the plans and specifications.

I reject Avondale's argument. Article XVIII(g) provides:

> "The warranties and guarantees set forth in article VIII, relating to speed, fuel consumption, SPA carrying capacity and deadweight tonnage, in this article XVIII, relating to any auarantee deficiency and in article XXXVIII, relating to design responsibility for the barge, are exclusive and are in lieu of all implied warranties (including but not limited to any implied warranties of merchantability, fitness for a particular purpose and workmanlike services)."

The OXY plaintiffs claim that Avondale breached its contract and its warranty. In particular, they claim that upon delivery the OXY PRODUCER's tug and barge were not properly mated in accordance with the plans and specifications (i.e., there was insufficient contact between the tug and the barge along the greenheart surfaces),[22] that the bumper pads and link arms were defective and that consequently the vessel was unseaworthy. The plaintiffs also claim

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At most this provision disclaims all implied warranties. It, however, does not disclaim express warranties like the warranty that the vessel be seaworthy upon delivery. To read article XVIII(g) broadly to disclaim all warranties and remedies other than those stated would be particularly inappropriate given that article XVIII limits itself to providing for Avondale's one year guarantee and does not mention Avondale's express warranty to deliver a seaworthy vessel.

Article XXXVI provides,

> "notwithstanding any other provision of this Construction Contract, the rights and remedies as expressed herein shall be exclusive and in lieu of any other remedies available to Purchaser and to Contractor, whether in contract, tort or otherwise."

This provision simply limits the parties' rights to those in the contract. The warranty that the vessel will be seaworthy upon delivery is part of the contract. Article XXXVI, therefore, does not conflict with the warranty.

22 This claim was initially presented by Henry and adopted by the OXY plaintiffs at trial.

that Avondale negligently performed its contract in constructing and delivering the vessel in the above condition.

3. VICTORIA PURCHASE ORDER

Victoria contracted with Avondale to design and manufacture the bumper pads for the vessel in accordance with the terms of the Purchase Order. Victoria warranted that the pads would be suitable for the service intended.[23]

The OXY plaintiffs claim they were third party beneficiaries of the Purchase Order. They claim that Victoria breached its contract and its warranty in that the pads were, in several respects, insufficient to restrict relative movement between the tug and the barge. In particular, the OXY plaintiffs claim that the billets in the pads were not vulcanized as required by the Purchase Order. The plaintiffs also claim that Victoria was negligent in designing and manufacturing the pads.

4. HVIDE SUPERVISION AGREEMENT

Hvide contracted to supervise both the design and construction of the vessel. Hvide contracted to "review and . . . cause Henry to review and approve all Contractor working plans and drawings and vendor plans and drawings according to the Construction

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23 Purchase Order, Appendix I, paragraph (I), provides that "the Vendor shall be responsible for equipment compatability and performance for the service intended or implied. The equipment shall be complete and ready for operation."

Contract and the Plans and Specifications."[24] Hvide also contracted to "provide qualified on site supervisory staff which [would] perform construction inspection . . . to assure that the Vessel [was] constructed in accordance with the Construction Contract and the Plans and Specifications . . . at the Shipyard and at the facilities of such subcontractor."[25]

Hvide warranted that the Catug Design was seaworthy and had been fully incorporated into the plans and specifications prepared by Henry. Hvide also warranted that the plans and specifications called out a seaworthy vessel and that the vessel would be constructed in accordance with the plans and specifications.[26]

The OXY plaintiffs claim that Hvide breached its contract and warranty and was grossly negligent in doing so. The OXY plaintiffs claim that Hvide completely failed to supervise Henry, Avondale and Victoria and allowed those parties to negligently breach their contracts.

V. THE MATING OF THE VESSEL

Once the tug and the barge had been completed, it was necessary to "mate" them in the shipyard. During April, 1981, the tug and the barge were mated together two or three times in order to achieve a sufficient fit. Between April 28th and

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24 Supervision Agreement, section 9.

25 Supervision Agreement, section 10.

26 Supervision Agreement, section 4(c) and section 10.

May 4th, the vessel was tested during sea trials. Following the sea trials, the vessel was disengaged as part of a Coast Guard inspection. On May 27th, the vessel was remated for the final time. The OXY PRODUCER was delivered on June 9, 1981.

The Barge Specifications, section VIII, subsection 6, require:

> The Barge Contractor will adjust the fit of the tug and the barge by first mating the two units and taking measurements from inside the tug crossover structure between the tug and barge greenheart surfaces with the tug in negative buoyancy through 1/2 inch pipe plug holes. Measurements are to be recorded, tug and barge are then to be disconnected and the top greenheart planed to obtain a 85-90% contact. When specified contact is obtained on the top greenheart, the bottom contact is to be measured through drilled holes in the aft rake ballast tank on the wedge box. Readings are to be recorded, tug and barge are then to be disconnected, and barge to be partially deballasted so that any shims, as required, can be welded to the bottom of the barge mating surface with the tug to obtain a 80-85% contact.

The proper mating of the vessel required the specified percentage of contact between the tug and the barge along the greenheart surfaces as measured through special holes ("measuring holes"). This method was developed by Hvide during its experience with the Seabulk vessels, the previous generation of catug ITBs. Henry incorporated the method and the greenheart contact requirement into the plans and specifications of the OXY PRODUCER.

It is uncontroverted that the measurements of the contact between the tug and the barge along the greenheart surfaces after the final mating taken by Robert Bibbo, an employee of Avondale, recorded contact at only two out of ten measuring holes along the barge greenheart and no contact at any of the eight measuring holes along the tug greenheart.[27] Furthermore, at the holes where there was no contact, Bibbo measured varying gaps between the tug and the barge of up to one inch.

Avondale and Hvide, nevertheless, argue that the vessel was properly mated upon delivery. They offered the testimony of Professor Rene Teesta, an expert in structural design and in the determination of forces causing failures in structures; Jan Van Rynbach, an expert in naval architecture and marine engineering; Brian Sowery, Vice-President of Engineering for Hvide; and Ed Bellyk, the Hvide

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27 Bibbo's measurements indicate only slightly more than ten percent greenheart contact at the measuring holes.

supervisor who was responsible for supervising the mating of the vessel. These witnesses testified that the measuring holes did not accurately reflect the percentage of greenheart contact because the holes were located between the frames of the vessel. Although there was no physical evidence to support such a claim, they argued that contact existed at the frames because that was where the weight of the vessel was supported. They testified that in their opinion the vessel's strong performance during sea trials was a more reliable indication that there was sufficient greenheart contact.

I find Avondale and Hvide's argument unpersuasive for several reasons. First, Carlton Ledet, a professional engineer and the Avondale employee responsible for mating the vessel, testified that he was not even trying to obtain a high percentage of greenheart contact. He was aware that the percentage of greenheart contact at any point, including the frames, was easily determinable by using "bluing" or some similar substance. He admitted that he failed to do so because greenheart contact was not important to him. He explained that he was simply trying to obtain two matching parallel greenheart and steel surfaces that would "wear in" well together at sea. Yet even Ledet admitted that had he known about Bibbo's measurements, he would have found the final mating unacceptable.

Second, the frames were about two feet apart so that even if there had been contact at every frame there still would have been much less than 80% greenheart contact. Furthermore, the steel surface between the frames was one inch thick so that it is unlikely that the surface buckled enough to register a one inch gap in between frames and yet was in contact at a frame only one foot away.

Third, Avondale and Hvide's witnesses did not appear to realize that the vessel was disengaged and remated after the sea trials and that Bibbo's measurements were taken of the final mating before delivery. The vessel's performance during sea trials therefore did not reflect the fit of the final mating but rather reflected the fit of a previous mating. Furthermore, Roderick Hulla, an expert in naval architecture, and Robert Giblon, an expert in naval architecture and marine engineering, testified that the catug ITB can remain rigidly mated with only a few points of contact at "high spots" of the greenheart until it either "wears down" or gets knocked off those high spots. A good performance at sea trials therefore is not necessarily inconsistent with a poor fit.

Accordingly, I find that the OXY PRODUCER was delivered with virtually no greenheart contact and large gaps between the tug and the barge along its greenheart surfaces. The vessel was therefore not constructed in accordance with the plans and specifications.

Avondale argues that the OXY plaintiffs are barred from recovery for any deficiency in the mating of the vessel because Hvide was its agent and Hvide authorized the mating procedure and accepted delivery with full knowledge of Bibbo's measurements. I reject Avondale's argument because the Supervision Agreement, section 2, clearly provides that Hvide was an independent contractor with no authority to unilaterally modify the requirements of the plans and specifications.[28]

Accordingly, I find that Avondale breached the Construction Contract by failing to construct the vessel in accordance with the plans and specifications. I also find that Hvide breached the Supervision Agreement by not properly supervising Avondale and by failing to assure that the vessel was constructed in accordance with the plans and specifications.

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28 Supervision Agreement, section 2 provides:

> 2. Independent Contractor. The Supervisor shall perform all of the work specified in this Agreement as an independent contractor, and, except as expressly contained in this Agreement, nothing shall be deemed to constitute the Supervisor and/or its employees or consultants as the agents of the Owner for any purpose whatsoever. Except as expressly provided herein, the Supervisor shall have no authority to incur any obligations, contractual or otherwise, in the name of the Owner or for the account of the Owner.

Furthermore, I find that Avondale was negligent in mating the vessel with so little contact. Ledet testified had he known about Bibbo's measurements he would have found the final mating unacceptable. Avondale, however, failed to provide any explanation for why Ledet, its engineer in charge of the mating, did not know about Bibbo's measurements which were taken pursuant to an explicit requirement of the Construction Contract. The OXY plaintiffs' tort claims, however, are barred by Article XXXVIII of the Construction Contract which provides:

> Notwithstanding any other provision of this Construction Contract, the rights and remedies as expressed herein shall be exclusive and in lieu of any other remedies available to Purchaser and to Contractor, whether in contract, tort or otherwise.

Accordingly, I find that Avondale is not liable to the OXY plaintiffs for its negligence in connection with its performance of the Construction Contract.

Finally, I find that Hvide was negligent in supervising the mating of the vessel. Bellyk, the Hvide supervisor responsible for the mating, testified that he was not even at the final mating of the vessel. In fact, Bellyk admitted that he could not remember being at any of the matings of the vessel. Bellyk explained that while he had worked very closely with Ledet in mating the first of the OXY vessels, the OXY TRADER, he

relied almost entirely on Ledet to properly mate the second vessel, the OXY PRODUCER. Ledet, however, testified that he had no prior experience with catug ITBs before his work on the OXY TRADER. The OXY plaintiffs contracted with Hvide to supervise Avondale precisely because Avondale had no expertise in catug ITBs while Hvide had "unique expertise".[29]

VI. INITIAL CASUALTY ON SEPTEMBER 12, 1981

1. THE CASUALTY

The OXY PRODUCER embarked on its maiden voyage on June 23, 1981. It was operated and managed by Hvide pursuant to a contract by which Hvide was responsible for hiring and training the captain and crew and for maintaining the vessel in good repair.[30] That voyage was uneventful. The weather was moderate and the vessel encountered no difficulty. Richard Graham was the captain for the first leg of the voyage to the Soviet Union. He was relieved by Captain Peter Kanellos who made the return voyage.

The vessel returned to the United States in August of 1981. At Jacksonville, Florida the vessel changed crews except for the Captain and then proceeded to Taft, Louisiana to load cargo. It returned to Florida and embarked from Jacksonville on its second and last voyage on September 5, 1981. At that time there were two storm systems in the North Atlantic.

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29 Supervision Agreement, page 3.

30 Seabulk Transmarine II, Inc., the sub-bareboat charterer, a Hvide party, entered into a Management Agreement with Hvide Shipping, Inc. See also footnote 1.

The OXY PRODUCER encountered its first difficulties on the night of September 11th. The weather conditions that night and into the next morning were more severe than the vessel had previously experienced. The seas were confused due to the confluence of the effects of Hurricane Emily and the tropical storm that had been Hurricane Floyd. The significant wave height reached approximately 14 feet and the wind topped force 9 on the Beaufort scale.[31] The vessel, however, was designed to easily weather these conditions.

The first signs of trouble were noticed by Ed Gagnon, second assistant engineer, during his midnight to 4 a.m. watch. Gagnon testified that he heard "groaning" sounds that resembled steel rubbing against wood and then felt some relative movement between the tug and the barge. The movement was insignificant at first, less than one inch, and not continuous. The movement, however, progressively increased. Although there is some conflict in the testimony of members of the crew, most thought, and accordingly I find, that the movement was in a fore and aft direction.

Chief Mate Frederick Murphy relieved Gagnon on watch at 4 a.m. At first light, Murphy noticed that there was significant movement, about one inch, between the tug and the barge. Murphy and Chief Engineer Brian Donhowe proceeded to check the link arms to discern the cause of and the solution to the

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31 Force 9 on the Beaufort scale is equivalent to a strong gale with a velocity of 41-47 knots.

movement. By this time, around 6 a.m., the pins in the pillow blocks on which the link arms pivoted were beginning to work their way out of their fittings. There was already some deformation of the pillow blocks and cracks in the welds which held them to the deck of the tug.

The crew spent the next few hours trying to prvent the link arms from separating from th pillow block assemblies. They also tried to restrict the movement of the link arms by inserting plywood in the space between the cradle pins and the metal plates of the cradle assemblies in which the pins lay. The Captain ordered lines run between the tug and barge to secure them together and draped mooring lines between the tug and the barge to take up the space between them and restrict movement. He and the Chief Engineer also tried to ride the tug up onto the barge tongue by adjusting the speed and course.

Despite these efforts the movement increased. Leaks in the tug hulls became evident in the engine room sometime before 9 a.m. Around 10 or 11 a.m. the welds of the pillow blocks broke loose and their pins were forced out of their housings. The link arms were put into compression as a result of the cradle pins striking the forward face plates of the cradle assemblies. The fore and aft movement dramatically increased. Members of the crew testified that movement eventually reached up to four to eight inches fore and aft, and several inches both laterally and vertically. At some time during the morning, one of the bumper pads came off the barge.

In the afternoon the weather and the sea conditions improved dramatically. During the same time, the Chief Engineer added several plates to the thrust shims between the tug and the barge, thereby reducing the space between them. The combined effect of these changes and the Captain's continued efforts to ride the tug up on the barge eventually brought the relative movement under control.

The Captain then decided to divert the vessel to the Azores for repairs. He navigated his crippled vessel several hundred miles and arrived in the Azores on the night of September 14th.

2. THE CAUSE

Each party called experts to explain the cause of the casualty suffered by the OXY PRODUCER on September 12, 1981.[32] Each party's experts presented a different theory of the casualty. These theories varied widely and were often marred by the experts' obvious bias. Their tendency to be advocates and to protect the parties which called them often made their explanations obscure and illogical. Of the experts only Roderick Hulla was fully candid and responsive, and I found his testimony the most helpful.

The experts who testified all agreed that the damage sustained by the vessel on September 12th was caused by relative movement between the tug and the barge. That, however, is where their agreement ended.

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32 Victoria presented no experts or witnesses of its own. Victoria's position seemed to largely parallel that of Avondale.

They disagreed on the primary direction of the movement,[33] and more importantly for purposes of this case, they disagreed as to the initial cause of the movement. While no single expert's explanation was completely satisfying, each contributed to an explanation of what happened on the 12th.

All the experts in naval architecture and marine engineering agreed that the design of the OXY PRODUCER, like that of any catug ITB, relied primarily on friction along the steel to greenheart contact in the wedge fit to prevent relative motion between the tug and the barge.[34]

Avondale's experts, Professor John Tien, an expert in metallurgy, materials and forensic analysis, Professor Teesta, Van Rynbach and Captain John Sullivan, a master mariner, explained that some relative movement was generated as part of the design of the wedge fit itself because greenheart, although very hard, wore down slightly, particularly on initial voyages. As the greenheart wore down, the amount of friction preventing relative movement deteriorated and eventually the tug was able to move up further onto the

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33 A considerable amount of the expert testimony offered by the parties was concerned with explaining the direction of the relative movement between the tug and the barge. The direction of the movement, however, is only important to the extent that it helps explain the initial cause of the movement because, once begun, movement could take any direction depending on the action of the seas.

34 See *supra*, page 6.

barge tongue. Avondale's experts stressed that proper operation of the vessel required periodically moving the tug up onto the barge tongue ("tightening up" the fit) as the greenheart wore. This was accomplished by disengaging the link arms, moving the cradle assemblies forward on the barge and then re-engaging the link arms in the new forward position, thus pulling the tug further onto the barge tongue and increasing friction along the greenheart surfaces of the wedge. The experts agreed that tightening up could only safely be accomplished in port.[35]

Roderick Hulla, the Henry employee responsible for preparing the plans and specifications and an expert in naval architecture, explained that greenheart wear was an integral part of the design of the wedge fit. The steel surfaces wore down the greenheart at those points they pressed most firmly against ("high spots") and thereby gradually molded ("bedded in") the greenheart surfaces to match them. He explained that if the steel to greenheart interfaces had the percentage of contact required in the plans and specifications, gradual bedding in of the greenheart followed by periodic tightening up would eventually achieve a near perfect fit of virtually 100% contact. If, however, there was insufficient greenheart contact, greenheart wear could be dangerous because the fewer the points of contact the more rapid the wear down.

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35 Catug ITB technology now enables tightening up to be performed at sea, although it is still generally performed in port.

Rapid wear down increased the possibility that the vessel would suddenly lose all friction at sea before the crew had an opportunity to tighten up. Furthermore, Hulla explained that if there were large gaps between the tug and the barge along the greenheart surfaces, once the vessel wore off its high spots, it would be free to move about to the extent of those gaps.

The plaintiffs' experts, Jan Lorenzen and Hjalmar Edmund Breit, both experts in naval architecture and marine engineering, explained that the bumper pads, link arms and thrust shims were not designed to limit significant relative movement between the tug and the barge once it had begun. Furthermore, once begun, movement tended to increase geometrically because movement further reduced any greenheart contact and distressed the bumper pads and link arms thereby allowing for increased movement. The only way to reduce movement was to tighten up.

Based on this expert testimony, I find that the OXY PRODUCER was unseaworthy upon delivery. Because there was insufficient contact between the tug and the barge along the greenheart surfaces to create sufficient friction, there was a potential for dangerous relative movement beyond that arising from normal bedding in. Bibbo's measurements clearly establish that upon delivery the tug and the barge were not in contact except at a limited number of high spots in the greenheart, that there were large gaps between the tug and the barge along most of the rest of the greenheart

surfaces and that the steel and greenheart surfaces were not compatible for normal bedding in.

After the OXY PRODUCER left the shipyard, the mass of the tug sitting on the barge tongue at only a few high spots caused rapid wear down of these spots. The friction created at those points of contact was nevertheless sufficient to prevent the vessel from experiencing relative movement in the moderate sea conditions it encountered before September 11th. The sea conditions of September 11th and 12th, however, were characterized by unusually short and steep waves which tended to pitch the tug violently against the barge.[36] As a consequence, the vessel either finally wore off its high spots,[37] was knocked off them or a combination of both. Because there were large gaps between the tug and the barge along the rest of the greenheart surfaces, once the vessel came off the high spots, the tug and the barge were free to move relative to each other significant distances in any direction the sea action dictated. This movement damaged the bumper pads and link arms which were not designed to operate with relative movement beyond that caused by the normal bedding in of greenheart.

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36 This explanation was provided by Avondale's experts Van Rynbach and Professor William Donn, an expert in marine meteorology.

37 Hulla testified that the fewer the high spots the more rapid the wear down rate.

I find that the casualty suffered by the OXY PRODUCER on September 12th was caused solely by the poorly mated condition in which Avondale delivered the vessel. Had the vessel been delivered with the percentage of contact between the tug and the barge along the greenheart surfaces required by the plans and specifications, no significant movement would have developed and no damage would have been sustained. The vessel would have experienced nothing more than the designed minimal greenheart wear and gradual movement of the tug up onto the barge tongue. Furthermore, I find that the bumper pads and the link arms did not cause or contribute to causing any damage suffered by the vessel. On the contrary, the pads and the link arms were simply the most obvious casualties of the movement caused by the lack of greenheart contact upon delivery. Accordingly, I find that Avondale and Hvide each breached their warranties that the vessel would be seaworthy upon delivery.

3. THE PARTIES' ALTERNATIVE EXPLANATIONS

The plaintiffs, Avondale, and Henry each presented expert testimony in support of an alternative explanation of the cause of the casualty on September 12th. However, none of these explanations is supported by the evidence of this case.

The plaintiffs' experts, Lorenzen and Breit, testified that in their opinion the relative movement on September 12th was initially caused by deficiencies in the bumper pads. They testified that the cyclic

transverse loads on the pads generated by the action of sea waves caused a vibration in the pads. They described this as a "bounce and suck" phenomenon. The pads were not able to contain these loads because, among other reasons, the rubber inside them was not vulcanized, they were not preloaded to a sufficient compression, the clips holding the face plates were insufficient, and the face plates were crown shaped. Relative lateral movement thus developed between the tug and the barge. The plaintiffs' experts testified that this lateral movement placed transverse loads on the link arms. The link arms suffered damage because they were not able to withstand these transverse loads primarily due to the structure and strength of the pillow block assemblies. The deformation of the link arms allowed for increased lateral movement and eventually fore and aft movement. The fore and aft movement eventually sheared off the bumper pads primarily because the shear block structures were not strong enough to withstand any significant shear force. The plaintiffs' experts thus concluded that the cause of the damage suffered by the vessel on the 12th was the defective design and manufacture of the interconnection system as a whole and particularly the bumper pads and the link arms.

The plaintiffs' "bounce and suck" explanation is in direct conflict with the expert testimony of every other expert in naval architecture and marine engineering that the interconnection system, including the bumper pads and link arms, was not defectively

designed or manufactured. I agree with those other experts. The plaintiffs' explanation is also in direct conflict with the crew's testimony that the initial movement was in a fore and aft direction, that the initial movement was accompanied by the groaning sound of metal rubbing against wood and that there was fore and aft movement before any deformation of the link arms or the pillow blocks. Furthermore, the plaintiffs' explanation is not supported by the physical forensic evidence which indicates that the pads were damaged by fore and aft shear forces and not lateral compression and suction forces. Finally, the plaintiffs' explanation fails to explain why lateral movement did not develop at all before the 12th, but then suddenly became so severe on the 12th. Accordingly, I reject the plaintiffs' explanation.

Avondale's experts, primarily Van Rybach and Captain Sullivan, testified that in their opinion the initial movement on September 12th was caused by the operational negligence of the Captain, the crew and the Hvide management personnel in failing to tighten up the vessel after the first voyage. These experts testified that as a result of normal greenheart wear during the first voyage, the friction in the wedge was reduced and the tug began to move upon the barge tongue. As the tug gradually moved up on the barge, the link arms came out of tension. This loss of tension and the extent of the greenheart wear were reflected in the loss of compression in the neoprene pad located in the

after end of each cradle assembly.[38] Avondale's experts testified that based on the loss of compression in the neoprene pads, the Captain and crew should have tightened up the vessel in Florida. Had they tightened up the vessel, the fit and friction would have been re-established and no movement would have developed. Avondale's experts concluded that the Captain and crew negligently failed to tighten up because they did not have adequate experience or training in the operation of Catug ITBs.[39]

Avondale's experts based their opinion primarily on the statement of Captain Kanellos that his daily measurements of the thickness of the neoprene pads ranged from 1-3/4 inches to 2 inches.[40] Since the neoprene pads were 2 inches thick before

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38 Each neoprene pad was sandwiched between 2 metal face plates and the sandwich formed the after end of the cradle assembly against which the cradle pin pulled back drawing the tug up on the barge. As the tension in the link arms was lost, the cradle pins no longer pulled back against the after end of the cradle assemblies and the neoprene pads came out of compression.

39 Hvide admitted that the training of the Captain and crew was its responsibility. Hvide presented evidence that Captain Kanellos, Chief Mate Murphy and Chief Engineer Donhowe had each sailed as an observer on one of the Seabulk catug ITBs and had been briefed as to the operation of the interconnection system.

40 The neoprene pads were compressed to 1-3/4 inches when the link arms were in the tension required by the plans and specifications.

compression, they concluded that the pads had come out of compression and that therefore the vessel should have been tightened up. However, Captain Kanellos also testified that he observed that the neoprene pads always had significant bulges in them. A bulge in the neoprene pad resulted from the extrusion of the rubber in the pad when the pad was compressed. Captain Sullivan admitted that if Captain Kanellos had observed significant bulges, that would have indicated that the neoprene pads were always under substantial compression and tightening up was not necessary.

I find that Captain Kanellos' visual observation of the bulge in the neoprene pads is a more reliable indication of the compression of the pads than his measurements for several reasons. First, the Captain's observations are corroborated by the testimony of Chief Mate Murphy who testified that he visually monitored the pads continuously and that he too observed that the pads always had significant bulges. Second, the expert testimony, including that of Avondale's witnesses, was that the thickness of the neoprene pads was difficult to measure accurately because the thickness varied depending on where along the length of the pad the measurement was taken. Third, the method of measuring the pad with a simple straight edge ruler was itself crude and inaccurate. Fourth, if the pads had come completely out of compression before September 11th, there would have been relative movement before the 11th; and I find from the consensus of the crew's testimony that there was no movement before the 11th.

Finally, even assuming arguendo that the Captain and the crew were negligent in failing to tighten up the vessel in Florida after the first voyage, Avondale failed to offer any evidence that tightening up the OXY PRODUCER in the poorly mated condition in which it was delivered would have prevented the casualty on the 12th. On the contrary, Hulla and Giblon testified that since the vessel's steel and greenheart surfaces were completely mismatched, tightening up would have only moved the tug up onto other high spots of the greenheart. I agree. The vessel could have just as easily come off these new high spots on the 12th as it came off the high spots on which it rested at the time of delivery. The huge gaps along the rest of the greenheart surfaces would have remained. No amount of tightening up would have resulted in sufficient greenheart contact because the contours of the greenheart surfaces on the OXY PRODUCER were so dissimilar to the contours of the steel surfaces they were intended to match. Accordingly, I reject Avondale's explanation.

Henry's expert, Robert Giblon, testified that in his opinion the damage suffered by the vessel on September 12th was caused by the poorly mated condition in which Avondale delivered the vessel and by the construction and operation of the vessel with an air gap between the thrust shims and the tug crossover. I have discussed the role of the poor mating

previously.[41] Giblon insisted that even with a poor fit, operation without an air gap -- i.e., with contact between the thrust shims and the tug crossover as required by the plans and specifications -- would have prevented any damage because the tug and the barge could not have moved fore and aft relative to one another and the link arms could not have been put into compression.

Every other expert, however, testified that an air gap at the thrust shims was necessary for the proper operation of the vessel.[42] An air gap allowed the tug to move up on the barge tongue as the greenheart bedded in and allowed for that process to be monitored by the gradual decompression of the neoprene pads. It also allowed for the tightening up of the tug and the barge. Furthermore, Giblon admitted that operation with an air gap could not have caused the movement initially. Giblon admitted that even with the air gap, if the vessel had the required greenheart contact, no damages would have resulted because the movement would not have begun. Accordingly, I find that the operation of the OXY PRODUCER with an air gap did not contribute to the casualty on September 12th.

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41 In this respect Giblon's explanation was similar to that given by Hulla and that which I have adopted.

42 It was agreed, however, that the air gap should have been smaller than the space between the cradle pin and the forward face plate of the cradle assembly to prevent ever putting the link arms in compression.

4. THE CAPTAIN AND CREW'S RESPONSE TO THE CASUALTY

Avondale also argued that whatever the cause of the initial movement, the negligence of the Captain and crew in responding to that movement, primarily in not "heaving to" when the movement began, was a contributing cause of the damage suffered by the vessel on September 12th. Captain Sullivan testified that in his expert opinion, since any headway by the vessel generally tended to exacerbate relative movement, Captain Kanellos should have brought the vessel to dead slow on the morning of the 12th.

Captain Kanellos testified that he maintained speed for two reasons. First, he wanted to get out of the confused seas and make it to a safe port as quickly as possible. Second, he wanted to use the forward thrust of the engines to ride the tug up on the barge tongue. Captain Lawrence Palmer, a master mariner called by Hvide,[43] testified that in his expert opinion, the Captain and crew performed to the highest professional standard of seamanship. Captain Palmer testified that the Captain's decision to reduce the speed of the vessel two knots was a reasonable balancing of the advantages and disadvantages of making headway as explained by Captain Kanellos and Captain Sullivan. Captain Palmer also testified that

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43 The Captain and the crew of the OXY PRODUCER were employees of Hvide pursuant to the Sub-Bareboat Charter, Article 3(b), the Management Agreement, paragraph 2(f), and Time Charter, sections 6.7 and 6.8.

in his expert opinion the other repair efforts of the crew, including their work on the pillow blocks and the running of the lines, were all well taken and well performed.

The Captain and crew's efforts were in fact successful in getting the unseaworthy vessel to a safe port several hundred miles away. Accordingly, I find that Avondale failed to carry its burden of proof that the Captain and crew of the vessel were negligent in responding to the casualty of the 12th.

VII. SINKING ON SEPTEMBER 20, 1981

1. THE SINKING

When the OXY PRODUCER arrived in the Azores on the night of September 14th, Captain Kanellos anchored the vessel about half a mile off the breakwater at the Port of Ponta Delgada. The next morning a thorough damage survey was conducted and repairs to the vessel were begun. A replacement bumper pad was ordered, but was not expected to be delivered until September 21st.

Meanwhile, Paulo Cordiero, an employee of the vessel's agent Casa Bensuade, was arranging for entry of the OXY PRODUCER into the harbor. His efforts were complicated in two particulars. First, the vessel's draft of 38 feet upon arrival was too deep to safely berth in the harbor.[44] Second, the NATO quay, which was the deepest berth in the harbor, was

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44 No vessel as large as the OXY PRODUCER had ever berthed in the harbor.

"reserved" for NATO vessels. One NATO vessel was due to arrive in the harbor on September 21st and another on the 24th. To resolve these problems, Cordiero set up a meeting for the 16th among Captain Kanellos and John Dorn, the director of fleet operations for Hvide, and the Harbor Master, Rui Mourao Cordeiro Castro.

Captain Kanellos testified that at the meeting he requested immediate entry into the harbor and that the Harbor Master denied immediate entry.[45] The Captain also testified that he explained to the Harbor Master that the vessel needed to enter in order to effect repairs; however, he did not specifically declare that it was an emergency. The Harbor Master raised numerous concerns, conditions for entry, and excuses in denying immediate entry. The Captain and John Dorn left the meeting under the belief that they could not obtain permission to enter the harbor until: (1) they reduced the draft of the vessel sufficiently to insure that under no condition would there be any danger that the vessel might bottom out and spill its hazardous cargo; and (2) they received replacement bumper pads necessary to complete the repairs to insure that the vessel would not prevent scheduled NATO vessels from berthing at the NATO quay.

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45 Captain Kanellos testified that there were some language problems at the meeting.

After the meeting, the Captain turned his attention to repairing the vessel. He relied primarily on the continuing efforts of Casa Bensaude, Hvide and the American Bureau of Shipping to obtain entry into the harbor. In addition, the Captain had a diver survey the harbor at the NATO quay to determine what draft the vessel would need to achieve in order to berth safely. Permission to enter, however, was never granted.

Meanwhile, repairs on the vessel went forward at the anchorage although they were hampered by the inability to berth the vessel. By the night of September 19th, the leaks in the engine room had been sealed and the pillow block assemblies had been straightened out and partially rewelded to the deck.[46] While these repairs were being completed, the Captain was closely monitoring the weather forecasts. The forecast on the 18th and 19th was for heavy weather to pass over the port on the 20th due to tropical storm Harvey which was southwest of the Azores.

On the night of the 19th, Captain Kanellos considered the options available to him. For example, he considered remaining at anchor off the breakwater ballasted down by the head. He was concerned, however, that the vessel might drag anchor and run aground. He was not confident that the area was good holding ground for his anchor and he was concerned about the vessel's proximity to the breakwater. He

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46 Experts estimated repairs on the pillow blocks were 30% to 50% complete.

decided not to remain at anchor because in his opinion the risk of dragging anchor was too great in light of the potential catastrophic effects of a spill of the vessel's SPA cargo. The Captain also considered entering the harbor but dismissed that alternative because he had no permission. It also would have been dangerous to enter the harbor without a pilot, or at night or in heavy weather.

Captain Kanellos ultimately decided to weigh anchor and try to maneuver the vessel in the same manner he had successfully used in bringing the vessel to the Azores. The Captain had the vessel deballasted to maximize the vessel's maneuverability, had lines run between the tug and the barge to hold them together and had the link arms tightened up through the use of hydraulic rams. At about 6 a.m., the OXY PRODUCER weighed anchor. Captain Kanellos attempted to find a course and speed which minimized the relative movement of the tug and the barge. The Captain had anticipated that the seas would be rough, perhaps of significant wave height of 10 to 12 feet, but that the swells would be uniform and from the southwest as a result of tropical storm Harvey. Unfortunately, just as the vessel weighed anchor, an unforecasted norther passed over the island producing confused seas of significant wave height between 12 and 16 feet. In the confused seas, the vessel experienced increasing relative movement similar to that which it experienced on the 12th; however, the movement developed much more rapidly because the vessel had not been fully

repaired. Less than two hours after weighing anchor, the movement of the barge tongue banging against the hulls of the tug opened large holes in the hulls and the tug sank.

2. THE CAUSE

The experts who testified agreed that the OXY PRODUCER sank on Septmber 20, 1981 due to relative movement between the tug and the barge. They also agree that the relative movement resulted from the unrepaired damage suffered by the vessel on September 12th. I have previously found that the poorly mated condition in which Avondale delivered the vessel rendered it unseaworthy and caused the damage suffered by the vessel on the 12th. For the same reasons, I also find that the poorly mated condition in which the OXY PRODUCER was delivered and the damage caused by that condition on the 12th caused the sinking of the vessel on the 20th. The plaintiffs do not claim and I do not find that there was any other contributing cause of the sinking on the 20th.[47] Avondale,[48] however, claims that the negligence of Captain Kanellos, a Hvide employee,[49] in taking the vessel to sea on the 20th was a superseding cause, or least a contributing cause, of the sinking. I disagree.

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47 The plaintiffs, of course, claim that the cause of the damage on the 12th and therefore the sinking of the 20th was the defective design and manufacture of the bumper pads and link arms. I have previously rejected this claim.

48 Henry and Victoria also took this position at trial.

49 See footnote 43.

The plaintiffs having sustained their burden of establishing a prima facie case of liability against Avondale for the sinking of the vessel, Avondale bears the burden of establishing any intervening negligence on the part of Hvide as an affirmative defense. *See Jones on Evidence,* § 7 (6th ed. 1972). In support of its claim, Avondale offered the testimony of Captain Sullivan and also relied on the testimony of Captain William McAuliffe, offered by Henry. Both are master mariners. They testified that in their expert opinion Captain Kanellos was negligent in, first, failing to try more diligently to enter the harbor before the 20th and, second, in taking the vessel to sea on the 20th instead of riding out the storm at anchor.

Captain Sullivan and Captain McAuliffe testified that they would have done everything necessary to get the OXY PRODUCER into the harbor on the 18th once they knew rough weather was approaching. They suggested that Captain Kanellos should have personally gone to the Harbor Master and demanded entrance into the harbor as a port of refuge. The Captains pointed out that the Harbor Master and the other harbor officials uniformly testified that the OXY PRODUCER would not have been denied entrance if they had known the vessel was in peril.

Captain Sullivan and Captain McAuliffe also testified that Captain Kanellos should never have even considered going to sea on the 20th because the OXY PRODUCER was clearly unseaworthy. They pointed out that the link arms were less than half rewelded, that leaks in the tug hull had reopened on the morning

of the 20th,[50] and that the vessel was missing a bumper pad. Captain Sullivan and Captain McAuliffe both discounted Captain Kanellos' concern about dragging anchor and grounding. They testified that if worst came to worst, Captain Kanellos could have requested tugs to stand by to assist the vessel.

In defense of Captain Kanellos, Hvide offered the testimony of Captain Palmer. Captain Palmer testified that in his expert opinion Captain Kanellos' actions in the Azores were reasonable under the circumstances. He testified that the Captain went beyond the normal responsibilities of a captain in his efforts to get the OXY PRODUCER into the harbor. He explained that it is unusual for a captain to be directly involved in requesting entry into a harbor and that usually the vessel's agent arranges for entry. Captain Palmer also testified that since the harbor officials denied the vessel entrance, the Captain had no choice but to put to sea on the 20th. He explained that it would not have been safe for the vessel to remain only half a mile off the breakwater. He explained that the seas from tropical storm Harvey were from the southwest and therefore would have tended to push the vessel directly toward the breakwater. Captain Palmer thought the option of using two anchors would not have been prudent because of the danger of crossing

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50 As the seas increased on the morning of the 20th, the barge tongue began to bang against the tug while still at anchor. The banging was exacerbated by the deballasting of the vessel in preparation for weighing anchor.

anchors. He also thought that stand-by tugs, even if they had been made available, might not have had sufficient time in rough seas to help the vessel if it had begun to drag anchor.

In light of the conflicting expert testimony, I find that Avondale failed to carry its burden of proving that Captain Kanellos was negligent in taking the OXY PRODUCER to sea on September 20th. At the time, Captain Kanellos had nearly three decades of experience as a captain. As a master mariner, he was himself an expert. The evidence shows that Captain Kanellos wanted to get his vessel into the harbor as much as Captain Sullivan, Captain McAuliffe or any other captain would have. Captain Kanellos personally met with the Harbor Master to request entry and then subsequently had a diver survey the harbor so that he might comply with one of the conditions for entry. He tried his best to obtain permission to enter but never obtain that permission.[51] Captain Kanellos failed but he was not negligent.

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51 While the harbor officials testified after the sinking that they would have granted entry if they had known the vessel was in peril, they in fact denied entry. Their denial indicates that they had a strong interest in preventing a large disabled vessel carrying highly dangerous cargo with a very deep draft, like the OXY PRODUCER, from entering the harbor with a storm approaching. The plaintiffs argue that there were also compelling political reasons for not allowing the vessel to berth at the NATO quay. I am therefore unable to speculate as to whether under any circumstances Captain Kanellos could have obtained permission to enter.

The evidence also shows that while in the Azores Captain Kanellos acted diligently to repair his vessel and to monitor weather conditions. I find that nevertheless, on the morning of September 20th, due to no fault of his own, Captain Kanellos faced an emergency situation in which his unrepaired vessel was imperiled by Tropical Storm Harvey.

In extremis, the Captain's conduct must be judged from the perspective of foresight and under the circumstances as he faced them. Avondale must establish that under those circumstances the Captain's actions were unreasonable. Simply showing that from the perspective of hindsight the Captain turned out to be wrong and that another course of action might have been successful is not sufficient. *M. P. Howlett, Inc. v. Tug Michael Moran*, 42 F.2d 619, 623 (2d Cir. 1970), *cert. denied* 400 U.S. 833. *Cf. Union Oil Co. of California v. Tug Mary Malloy*, 414 F.2d 669, 674 (5th Cir. 1969); *Esso Standard Oil, S.A. v. S.S. Gasbras Sul*, 387 F.2d 573, 580 (2d Cir. 1967), *cert. denied* 391 U.S. 914; *The Mary T. Tracy*; 298 F. 528 (S.D.N.Y. 1920), *rev'd on other grounds*, 8 F.2d 591 (2d Cir. 1925).

The Captain in his expert opinion thought that under the circumstances of the morning of the 20th the most prudent course of action was to put to sea. It is clear that the Captain was not successful. Even with hindsight, however, is not clear that he could not have successfully survived the storm at sea or that he would definitely have survived it at anchor. The expert testimony was that had it not been for

the norther, the Captain might very well have been successful in saving his vessel by putting to sea. Furthermore, had the Captain tried to ride out the storm, the vessel might very well have dragged anchor, grounded and spilled its cargo. Under these circumstances, I do not accept the invitation to second guess the prudence of the Captain's decision to put to sea.

Accordingly, I find that the sole cause of the sinking of the OXY PRODUCER on September 20, 1981 was the poorly mated condition in which the vessel was delivered.

VIII. ASSESSMENT OF LIABILITY

I find that the sole cause of the casualty suffered by the OXY PRODUCER on September 12, 1981 and its sinking on September 20, 1981 was the poorly mated condition in which it was delivered, and that Avondale and Hvide were solely responsible for the mating. Accordingly, I find that Avondale and Hvide are liable to the plaintiffs.

Because Henry and Victoria were in no way responsible for the poorly mated condition in which the OXY PRODUCER was delivered, I find that Henry and Victoria are not liable to the plaintiffs for any damage suffered by the OXY PRODUCER.

Avondale and Hvide each argue that their liability is limited by provisions in their respective contracts. These provisions must be construed against Avondale and Hvide. *See Gross v. Sweet*, 49 N.Y.2d 102, 107-108 (N.Y. 1979); 22 NY Jur2d, Contracts § 267; 41 NY Jur, Negligence § 5.

Avondale argues that pursuant to article XXXVI[52] and article XVIII[53] of the Construction Contract, the plaintiffs' only remedy against it is to recover the cost of repair or replacement of any deficiencies in its performance of the contract. Avondale argues that in this case its liability is limited to the cost of repairing the poor mating of the vessel.

I disagree. First, article XVIII, by its very terms, is nothing more than a one year guarantee on Avondale's workmanship and materials. It does not relieve Avondale of its contractual obligation to construct the vessel in accordance with the plans and specifications nor does it relieve Avondale of its warranty that the vessel would be seaworthy upon

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52 See *supra*, pp. 20-21.

53 Article XVIII(a) provides:

> The liability of the Contractor to the Purchaser under this Construction Contract on account of any such Guarantee Deficiency shall not extend beyond the actual corrective repair and replacement thereof at customary commercial shipyards or ship repair yard rates including the cost of the dockage of the Vessel, if necessary.

Article I(n) defines Guarantee Deficiency as:

> any weakness, deficiency, failure, breaking down or deterioration in workmanship or material produced or furnished by the Contractor in performing the Contract Work or any failure of any equipment, machinery or material produced or furnished by the Contractor or a vendor or subcontractor of the Contractor to function as prescribed by the Vessel Plans and Specifications.

delivery. Rather, article XVIII imposes on Avondale the additional obligation to repair or replace deficiencies which arise within one year after the vessel has been properly constructed and delivered. Article XVIII, therefore, does not limit Avondale's liability against the plaintiffs' claim that Avondale failed to construct the vessel in accordance with the plans and specifications or against the plaintiffs' claim that Avondale breached its warranty that the vessel would be seaworthy upon delivery. Second, since the vessel sank, the repair or replacement of any particular part of the vessel is impossible. Third, Avondale's reading of the contract would lead to the absurd result that if a defective $1 part had caused it to be unseaworthy and sink, Avondale would only have been obligated to replace that $1 part.

Accordingly, I find that Avondale is liable to the plaintiffs for its breach of the Construction Contract for damages arising out of the casualty suffered by the OXY PRODUCER on September 12, 1981 and its sinking on September 20, 1981.

Hvide argues that its liability arising out of its performance of the Supervision Agreement, whether in contract or tort, is limited Section 18 of that agreement. Section 18 limits Hvide's liability to $5,000,000 in the event of a "default" by Hvide.[54] A default is defined to include:

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54 Supervision Agreement, section 18(i).

> The failure of the Supervisor or HMI [Hvide] to perform any of the covenants, agreements, warranties or undertakings on its part to be performed under this Agreement. . .[55]

This language clearly covers Hvide's liability for any breach of the Supervision Agreement. For it to also limit Hvide's tort liability, the langugage must evince the clear intent of the parties to cover Hvide's negligence in performing the Supervision Agreement. *Gross, supra*, at 107-108. I find that section 18 does not indicate that the parties intended to limit Hvide's tort liability.

Accordingly, I find that Hvide is liable to the plaintiffs for its breach of the Supervision Agreement to the extent of $5,000,000 and for its negligence in performing that agreement without limitation for damages arising out of the casualty suffered by the OXY PRODUCER on September 12, 1981 and its sinking on September 20, 1981.

Furthermore, because Avondale and Hvide each had responsibility for the proper mating of the OXY PRODUCER, worked together on the mating and caused the plaintiffs an indivisible injury, I find that Avondale and Hvide are jointly and severally liable to the plaintiffs. Cf. *Kirtland v. J. Ray McDermott & Co.*, 568 F.2d 1166, 1171 n. 10 (5th Cir. 1978).

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55 Supervision Agreement, section 18(f).

Resolution of the proportion of contribution owed by Avondale and Hvide on their cross claims is reserved.

New Orleans, Louisiana, this 3rd day of June, 1986.

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

APPENDIX C

EMPLOYERS INSURANCE OF WAUSAU AS REPRESENTATIVE OF THOSE CERTAIN UNDERWRITERS SUBSCRIBING TO CERTIFICATE NO. 14880 and CERTIFICATE NO. 14482,

Plaintiffs,

SUWANNE RIVER SPA LINES, INC., ET AL.,

Plaintiffs-Appellees,

versus

AVONDALE SHIPYARDS, INC., ET AL.,

Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

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Before POLITZ, WILLIAMS, and JONES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motions of Avondale Shipyards, Inc., Hvide Marine International, Inc., Hvide Shipping Incorporated, and Seabulk Transmarine II, Inc., to dismiss the appeals are denied. The case is remanded to the District Court for reconsideration of its decision as to liability in the light of *East River Steamship Corp. v. Transamerica Delaval Inc.*, 106 S.Ct. 2295 (1986).

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EMPLOYERS INSURANCE OF WAUSAU, ET AL.	*	CIVIL ACTION
	*	NO. 82-4034 and
VERSUS	*	consolidated cases
	*	
AVONDALE SHIPYARD, INC., ET AL.	*	SECTION "G"

This matter is before me on remand from the Fifth Circuit Court of Appeals[1] for reconsideration of my June 3, 1986 determination of liability in favor of the charterer, time charterer and insurers of the OXY PRODUCER ("the Oxy plaintiffs") against defendants Avondale Shipyards, Inc. ("Avondale") and Seabulk Transmarine II, Inc., Hvide Marine International, Inc. and Hvide Shipping, Inc. ("Hvide")[2] in light of the Supreme Court's June 16, 1986 decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*[3]

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1 *Employers Insurance of Wausau, et al. v. Avondale Shipyards, Inc., et al.*, Nos. 86-3218 and 86-3473 (5th Cir. Nov. 5, 1986) (order remanding case).

2 1986 AMC 2770 (E.D.La. 1986).

3 106 S.Ct. 2295 (1986) (hereinafter, *East River*).

In its original complaint, the Oxy plaintiffs alleged admiralty and maritime jurisdiction under 28 U.S.C. § 1333 and diversity jurisdiction under 28 U.S.C. § 1332.[4] The parties concede that there was not in fact diversity of citizenship, that the Court's jurisdiction is solely in admiralty and that the Court has jurisdiction over the pendent state law claims.[5]

The Oxy plaintiffs alleged two claims against each defendant. First, they claimed each defendant breached obligations under its contract in connection with the construction of the vessel. Second, they claim each defendant was negligent in the performance of the contractual obligations it undertook. The Oxy plaintiffs alleged that defendants' breach of the construction and supervision contracts resulted in the construction of an unseaworthy vessel.

The Oxy plaintiffs also contended that the vessel sank as a result of the failurre of the vessel's interconnecting system, which failure was caused by the defective design, manufacture, and supervision of the installation of bumper pads manufactured for defendant Avondale by defendant Victoria Machine Works, Inc.

Based upon the tort allegations of the complaint, I found admiralty and maritime jurisdiction existed.[6]

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4 Complaint at 1, Doc. No. 1 (No. 82-4034).

5 Pre-Trial Order at 6, Doc. No. 389 (No. 82-4034).

6 1986 AMC at 2772-73.

After hearing the evidence, I rejected plaintiffs' claim that the vessel sank as a result of the manufacture or design of a defective product. Indeed, I determined, contrary to the Oxy plaintiffs' claim, that the "bumper pads and the link arms did not cause or contribute to causing any damage suffered by the vessel."[7] I specifically found that plaintiffs' "bounce and suck" explanation for the sinking was in direct conflict with the weight of evidence. Instead I found that the sole cause of the sinking of the OXY PRODUCER was the breach of defendants Avondale and Hvide's obligations under their building and supervision contracts to deliver a seaworthy vessel. I found that Avondale and Hvide each breached their contractual warranties that the vessel would be seaworthy upon delivery.[8] The findings that defendants' liability arose as a result of their breaches of contractual warranty are based upon the Oxy plaintiffs' pendent state law claims relating to the construction of or supply of services to a ship.[9]

I also find that Hvide was negligent in its supervision of the mating of the vessel. Assuming Hvide's negligence constituted a maritime tort, *East River* is still not implicated. Hvide's contract was not for the manufacture of a product but was instead for professional services.

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7 1986 AMC at 2788.

8 1986 AMC at 2778-2780, 2788.

9 Cf. *East River Steamship Corp.*, 106 S.Ct. at 2303 n.7.

Accordingly, I find that my decision as to liability is consistent with and supported by *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 106 S.Ct. 2296 (1986).

MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

APPENDIX E

Corrected Judgment

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Nos. 86-3218, 86-3473 & 87-3549
D.C. Docket Numbers CA-82-4034-G
c/w 82-4185 & 82-4186

EMPLOYERS INSURANCE OF WAUSAU as
Representative of Those Certain
Underwriters Subscribing to
Certificate No. 14880 and
Certificate No. 14482,
Plaintiff-Appellee,

v.

SUWANNEE RIVER SPA LINES, INC.,
Suwannee River Chartering, Inc., Permian
Trading Corporation, Occidental Export, Inc.,
Occidental Chemical Agricultural Products,
Inc., and Occidental Petroleum Corp.,
Plaintiffs-Appellants,

v.

AVONDALE SHIPYARDS, INC., et al., Defendants,
J.J. Henry Co., Inc., and
Victoria Machine Works, Inc.,
Defendants-Appellees.

OCCIDENTAL PETROLEUM CORP., et al.,
Plaintiffs-Appellants,
v.
AVONDALE SHIPYARDS, INC., et al., Defendants,
Victoria Machine Works, Inc.,
Defendant-Appellee.

OCCIDENTAL PETROLEUM CORP., et al.,
Plaintiffs-Appellants,
v.
AVONDALE SHIPYARDS, INC., et al., Defendants,
Victoria Machine Works, Inc.,
Defendant-Appellee.
EMPLOYERS INSURANCE OF WAUSAU as
Representative of those Certain Underwriters
Subscribing to Certificate No. 14880 and
Certificate No. 14482,
Plaintiff-Appellee,
Suwanne River Spa Lines, Inc., et al.,
Plaintiffs-Appellees,
v.
AVONDALE SHIPYARDS, INC., et al.,
Defendants-Appellants.

EMPLOYERS INSURANCE OF WAUSAU as
Representative of those Certain Underwriters
Subscribing to Certificate No. 14880 and
Certificate No. 14482, et al.,
Plaintiffs-Appellees,
v.
AVONDALE SHIPYARDS, INC. and
Ogden Corporation, Defendants-Appellants.
Nos. 86-3218, 86-3473 and 87-3549.

Appeals from the United States District Court
for the Eastern District of Louisiana

Before KING and JOHNSON, Circuit Judges, and Boyle,* District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argue by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the District Court in this cause are affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

February 13, 1989

ISSUED AS MANDATE:

*District Judge of the Eastern District of Louisiana, sitting by designation.

APPENDIX F

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

No. 86-3218, 86-3473 & 87-3549

EMPLOYERS INSURANCE OF WAUSAU as
Representative of Those Certain
Underwriters Subscribing to
Certificate No. 14880 and
Certificate No. 14482,
Plaintiff-Appellee,

v.

SUWANNEE RIVER SPA LINES, INC.,
Suwannee River Chartering, Inc., Permian
Trading Corporation, Occidental Export, Inc.,
Occidental Chemical Agricultural Products,
Inc., and Occidental Petroleum Corp.,
Plaintiffs-Appellants,

v.

AVONDALE SHIPYARDS, INC., et al., Defendants,
J.J. Henry Co., Inc., and
Victoria Machine Works, Inc.,
Defendants-Appellees.

OCCIDENTAL PETROLEUM CORP., et al.,
Plaintiffs-Appellants,

v.

AVONDALE SHIPYARDS, INC., et al., Defendants,
Victoria Machine Works, Inc.,
Defendant-Appellee.

OCCIDENTAL PETROLEUM CORP., et al.,
Plaintiffs-Appellants,
v.
AVONDALE SHIPYARDS, INC., et al., Defendants,
Victoria Machine Works, Inc.,
Defendant-Appellee.
EMPLOYERS INSURANCE OF WAUSAU as
Representative of those Certain Underwriters
Subscribing to Certificate No. 14880 and
Certificate No. 14482,
Plaintiff-Appellee,
Suwanne River Spa Lines, Inc., et al.,
Plaintiffs-Appellees,
v.
AVONDALE SHIPYARDS, INC., et al.,
Defendants-Appellants.

EMPLOYERS INSURANCE OF WAUSAU as
Representative of those Certain Underwriters
Subscribing to Certificate No. 14880 and
Certificate No. 14482, et al.,
Plaintiffs-Appellees,
v.
AVONDALE SHIPYARDS, INC. and
Ogden Corporation, Defendants-Appellants.
Nos. 86-3218, 86-3473 and 87-3549.

Appeals from the United States District
Court for the Eastern District of Louisiana

ON PETITIONS FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion February 13, 1989, 5 Cir., 198_,
_____ F.2d_____)

(March 20, 1989)

Before KING and JOHNSON, Circuit Judges, and Boyle,* District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a mjority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

NOS. 88-2049, 88-2052

Supreme Court, U.S.
FILED
JUL 17 1989
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CLERK

In the Supreme Court of the United States
October Term, 1988

EMPLOYERS INSURANCE OF WAUSAU, *ET AL.*
Petitioners

VERSUS

AVONDALE SHIPYARDS, INC., *ET AL.*
Respondents

OCCIDENTAL PETROLEUM CORPORATION, *ET AL.*
Petitioners

VERSUS

AVONDALE SHIPYARDS, INC., *ET AL.*
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONSOLIDATED BRIEF IN OPPOSITION TO THE PETITION

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SUMMARY OF ARGUMENT

The brief of Seabulk Transmarine II, Inc., Hvide Marine International, Inc. and Hvide Shipping Incorporated (collectively "Hvide")[1] in opposition to the Petitions for a Writ of Certiorari addresses only those questions raised in the Petitions relating to Hvide, specifically questions C and D of the Petition filed by Charles Lugenbuhl on behalf of Employers Insurance of Wausau, as Representative of Those Certain American Underwriters Subscribing to Certificate No. 14880 (Case Number 88-2049) and question 1 of the Petition filed by James B. Kemp, Jr. on behalf of Occidental Petroleum Corporation and the London Underwriters, *et al.* (Case Number 88-2052).

The Fifth Circuit's decision is consistent with the precedents of this Court and the decisions of other trial

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[1] The following information is provided pursuant to Supreme Court Rule 28.1 regarding respondents:

Hvide Shipping, Incorporated
Hvide Marine International, Inc.
Hvide Marine Transport Incorporated
Seabulk Corporation
Seabulk Tankers, Ltd.
Seabulk Chemical Carriers, Inc.
Seabulk Transmarine I, Inc.
Seabulk Transmarine II, Inc.
Seabulk Transmarine III, Inc.

and appellate courts of the United States. Pursuant to the trend highlighted by this Court's decision in *East River Steamship Corporation v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295 (1986), Hvide, as a party intimately involved in the manufacture of the vessel OXY PRODUCER, cannot be held liable in tort; the sole remedies against Hvide are those provided by way of breach of contract. The contract was negotiated at arms length between parties of equal bargaining power and substantial business and legal acumen. No reason exists for this Court to rewrite that contract.

Hvide adequately raised its defenses at the district court level. Even if it had not, the issue at bar is a question of law central to the decision of the appellate court and premised upon the *East River* decision, which was decided after the initial trial proceedings.

The Fifth Circuit's decision merits no further review.

ARGUMENT

A. Hvide's Performance as Supervisor of the Manufacturing Process Cannot Be Divorced From That Process.

Any attempt to distinguish Hvide's performance in the manufacturing process from the process itself is contrary to logic, good sense and *East River*. *East River* did not open the floodgates as Petitioners contend, but rather served as a dike to re-establish the proper segregation of the sea of tort from the land of contract. Petitioners now ask this court to assume the position of the little Dutch boy while Petitioners poke holes in the *East River* dike based upon artificial distinctions that will flood the courts with litigation over which actions are supervisory and which are related to manufacturing. Petitioners' holes will quickly outnumber the fingers available to the courts for holding back the recently dammed flood waters of tort.

The paucity of authority relied upon by Petitioners speaks for itself. Petitioners' sole recent citation[2] is a

[2] The several cases cited only by Petitioner Occidental Petroleum Corporation for the principle that a contract including the provision of services "may be exempted from the purview of *East River*", Petition of Occidental Petroleum Corporation, p. 9, cannot possibly stand for that principle as each case cited was decided prior to *East River*. In

pre-*East River* decision by a district court in New York, *Consolidated Edison Company of New York, Inc. v. Westinghouse Electric Corporation*, 567 F. Supp. 358 (S.D.N.Y. 1983). On careful examination, however, *Con Ed* does not support Petitioners's position and, to the extent that it may be read to provide such support, can no longer be viable after *East River*.

In *Con Ed*, the allegations of negligence against Westinghouse were twofold: First, it was claimed that Westinghouse was negligent in furnishing defective turbines, just as it is here claimed that Hvide and Avondale were negligent in furnishing a defective vessel. *Con Ed's* second set of negligence causes of action alleged negligent failure to warn of defects in equipment supplied to *other* customers, negligent failure to compile

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addition, the cases are inapposite on their facts and holdings: *LaRossa v. Scientific Design Co.*, 402 F.2d 937 (3d Cir. 1968), a wrongful death case, held a tort cause of action will *not* lie; *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950 (5th Cir. 1979) held a claim for strict liability against a party who provided services would *not* lie and, in any event, if this decision could in any way be interpreted as conflicting with the case at bar, it must be considered overruled by the Fifth Circuit's present decision; *Pepsi Cola Bottling Co. v. Superior Burner Service Co., Inc.*, 427 P.2d 833 (Alaska 1967) involved an unchallenged tort cause of action and upheld a lower court's decision to preclude instructions on breach of contract; *Rosos Litho Supply Corp. v. Hansen*, 123 Ill. App. 3d 290, 462 N.E.2d 566 (1st Dist. 1984) is an intermediate level Illinois court decision that arguably supports Petitioners' position but reads narrowly and appears to conflict with the leading Illinois Supreme Court decision, *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (Ill. 1982).

test data and negligent delay in advising Con Ed of problems revealed by the test data.

The New York court properly dismissed the first claim:

> As to Con Ed's claims concerning defective equipment and improper operating instructions, that portion of Con Ed's complaint must be dismissed for the reasons just stated: claims concerning defects in a product which have simply deprived the purchaser of the benefit of its bargain do not state a cause of action in negligence.

567 F. Supp. at 365-366.

In a footnote the court added:

> Although an argument can be made that the provision of operating instructions constitutes a service separate from the supplying of the equipment, we find the distinction artificial and conclude that Con Ed's claims concerning the operating instructions, insofar as they are based on a negligence theory, are subject to dismissal as part of Con Ed's claims concerning defective equipment.

567 F. Supp. at 366, n. 11.

In the present case any distinction between Hvide's direct supervision of the manufacturing process and Avondale's performance of the process is equally artificial. It is easy, in a sterile legal environment, to be caught up in the talismanic language of "provision of services". As is clear from the record, however, and as

was required by the Supervision Agreement, Hvide was intimately involved in the day to day operations at the shipyard during the manufacture of the vessel and its role cannot be divorced from the manufacturing process. Petitioners themselves admit Hvide was selected because of its "particular expertise concerning the design, *construction* and operation of catugs". Petition of Employers of Wausau, p. 22 (emphasis supplied).

The second group of negligence claims in *Con Ed* was severed from the contract by the New York district court and allowed to stand in tort. This portion of the decision, however, does not affect the correctness of the Fifth Circuit's ruling on the causes of action against Hvide. First, *Con Ed* would likely be decided differently today given the current state of the law in New York, discussed *infra*. Second, the claim against Hvide does not allege separate duties outside of the manufacturing process, but only alleges negligent performance of the duties specified within the four corners of the agreement. There is no allegation, as there was in *Con Ed*, of failure to warn of defects in vessels manufactured under Hvide's supervision for other customers, for example. Nor there is any allegation that Hvide negligently undertook to conduct tests and compile data *after* the manufacture of the vessel was completed. Thus, the New York court's

ruling on the second set of negligence claims is inapposite here.

Third, even if the New York court's decision was on point, this latter portion of its decision could not stand after *East River*. In *East River*, this Court had the opportunity the use a *Con Ed*-like judicial scalpel in carving out tort and contract liability on East River Steamship's fifth count. This Court refused to do so, however, even where the basis of the negligence count was the failure of the defendant properly to supervise the installation of a component part, a part that was manufactured elsewhere and installed by another party. Unlike Hvide, the *East River* defendant had no connection whatsoever with the manufacture of the component, not even in a supervisory capacity. This Court nonetheless dismissed the negligence claim and supported its ruling with a citation to a decision specifically rejecting the notion that services and manufacture can be separated when the services are integrally related to and inextricably intertwined with the manufacturing process of the ultimate product, *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942 (11th Cir. 1982). The *Flintkote* court reasoned:

> We are especially reluctant to make an exception to the [economic loss] rule where the exercise of professional skills occurred only

> in the process of manufacturing or constructing a product. To do so would effectively eviscerate the economic loss rule by permitting parties suffering economic losses to sue for the benefit of their bargain in tort by merely alleging, as does appellant here, that a party to the manufacture or construction of a defective good negligently performed some "professional" task.

678 F.2d at 950.

Even if underwriters are correct that a line should be drawn between a manufacturer and one who provides purely professional services totally unrelated to the manufacturing process,[3] that line cannot be drawn here. On the facts of this case, Petitioners contention would require the courts to become involved in distinctions based upon the type of tool involved. Here, the district court found that Hvide's employee, Robert Bibbo, personally measured the space between the barge and tug greenheart surfaces during the manufacture of the vessel. Thus Bibbo's ruler would have to be designated supervisory while a welding rod used by a shipyard worker would be of a manufacturing nature. Presumably

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[3] As noted by the Fifth Circuit, even those cases involving straightforward provision of professional services totally unrelated to any manufacturing process are somewhat vague as to the rationale for permitting a tort cause of action for negligent performance of a contract. The *East River* decision may well demonstrate that such causes of action are outmoded legal theories in search of a logical and rational basis.

Bibbo's ruler would become a manufacturing tool had it had been wielded by an Avondale shipyard employee with Bibbo merely observing the measurements.

Such fine distinctions serve no purpose in the larger scheme of determining the bounds of tort law. This court has clearly set forth those bounds in *East River.* The Fifth Circuit's decision is fully in accord with and follows the rationale and spirit of the *East River* decision. While Petitioners can cite no authority in support of breaking down the dikes, the courts that have considered like questions since *East River* have embraced this Court's clear distinction between tort and contract remedies. In fact, New York's highest court has repudiated the practice of alleging lack of due care in the performance of a contract as a separate tort cause of action. "It is a well established principle that a simple breach of contract is not to be considered a tort unless a legal duty *independent of the contract itself* has been violated", *Clark-Fitzpatrick, Inc. v. Long Island Rail Road,* 521 N.Y.S.2d 653, 656 (N.Y. 1987)(emphasis supplied). No such independent duty has ever been alleged, much less proven, in this case.

Even if such a duty were found, the clear trend is to prohibit recovery for mere economic loss in tort when a contract remedy exists. *See Alcoa Coal Company v. Clark*

Equipment Co., 816 F.2d 110 (3d Cir. 1987); *Learjet Corporation v. Spenlinhauer,* 707 F. Supp. 44, 47 n. 2 (D. Me. 1989). At least one jurisdiction has extended the economic loss rule to all cases involving contracts, without regard to the superficially appealing, but baseless "service v. manufacturing" distinction, on the theory that the law of contracts is meant to facilitate voluntary economic exchange. *Carmania Corp., N.V. v. Hambrecht Terrell International,* 705 F. Supp. 936 (S.D.N.Y. 1986)(allegations of negligent performance of architect dismissed). The concept that parties of equal bargaining power should be left to the benefit of their bargain, whether that bargain be for sales or service, is clearly the predominant view. Thus, the Fifth Circuit's decision here is consistent with existing law and merits no further review.

B. Occidental Needs No Special Protection In Their Contractual Dealings.

The parties to the Occidental - Hvide Supervision Agreement are precisely the parties of equal bargaining strength envisioned by the legions of decisions supporting contractual integrity. Petitioners argue that Occidental Petroleum Corporation is extremely unsophisticated with regard to shipbuilding. Occidental's longstanding and

extensive involvement with vessels belies this claim, but sophistication with regard to shipbuilding is hardly the issue here. The concept of equality in bargaining power has never been dependent on equality in professional knowledge. In fact, one can assume that if one had sufficient professional knowledge and expertise in a given area, one would not have found it necessary to contract for another's services in the first place.

What is relevant is the economic and business sophistication of the parties. If a contract is formed between two parties who deal in a commercial setting from positions of relatively equal bargaining strength and who bargain and negotiate concerning the specifications of the product being manufactured and the risk of loss arising from defects in manufacturing, no special protection by the courts is warranted. *S.M. Wilson & Company v. Smith International, Inc.*, 587 F.2d 1363, 1366-1367 (9th Cir. 1978). In *East River*, for example, East River Steamship Corporation no doubt had extensive experience in operating steam turbine propelled vessels. Nothing in the reported facts, however, gives any indication that they were the professional equal of Transamerica Delaval when it came to designing and manufacturing turbines. Nonetheless, as both were equals from the standpoint of economic power and

bargaining strength, this Court saw "no reason to intrude into the parties' allocation of risk". 106 S.Ct. at 2303.

In the present case the allocation of risk was obviously considered by the parties, negotiated carefully and, in specific language, spelled out in the Supervision Agreement and Insurance Letter Agreement. While the precise meaning of the terms of those agreements has been litigated below and still remains to be litigated in the damages trial of this case, there can be no question that Occidental and Hvide included terms in their bargain that each party thought beneficial with regard to allocation of risks in the event of a defect in the manufacture of the OXY PRODUCER. Petitioners' argument that lack of U.C.C. remedies should defeat the application of *East River* is put to rest by this very bargaining process: parties such as Occidental Petroleum Corporation are more than capable of incorporating not only U.C.C. warranties, but any other allocations of risk they can negotiate into their contracts.[4] Given the arms length negotiation of these agreements, this Court need not step in to provide relief to Occidental Petroleum

[4] The statement in the Petition of Occidental Petroleum Corporation, p. 9, n. 5, that Occidental retained its U.C.C. remedies against Hvide is totally unsupported by any evidence in the record.

Corporation from the consequences of its business dealings.

C. No Damage to "Other Property" Exists.

Contrary to the assertions of Petitioners, no damage to "other property" was sustained in the sinking of the OXY PRODUCER. Petitioners assert that a loss of crew effects will be shown at the damages trial. What Petitioners neglect to mention is that the crew effects, which do not constitute "other property" in any event, were paid for by the crew's employer, Hvide, and not by Petitioners.

It is well established that the loss of property incidental to the failure of a product, when that property is closely associated with the product, does not constitute "other property". *Chicago Heights Venture v. Dynamite Nobel of America, Inc.*, 782 F.2d 723 (7th Cir. 1986)(damage to ceilings, floors and bricks not "other property" when defective roof installed); *Purvis v. Consolidated Energy Products Company*, 674 F.2d 217 (4th Cir. 1982)(damage to tobacco crop not "other damage" when defective curing barn ventilating system installed); *Agristor Leasing v. Guggisberg*, 617 F. Supp. 902 (D. Minn. 1985)(injury to feed and to cows not "other property" when defective feed system installed). The miscellaneous

effects of the crew, like the many other bits of equipment on a vessel, are likewise not "other property" for purposes of establishing tort liability.

Moreover, what losses the crew sustained, contrary to Occidental's assertions, were paid by Hvide. Occidental cannot claim losses of a third party, or losses of Hvide as justification for a departure from its contractual bargain. *See Colonial Park Country Club v. Joan of Ark*, 746 F. 2d 1425 (10th Cir. 1984)(the existence of one party's tort claim does not permit every other contract claim to be raised in tort).

Finally, the losses at issue are *de minimis.* The total amount of the crew's claim was approximately $32,000. These claims were paid by Hvide as the employer of the crew. Approximately $28,000 was reimbursed by Hvide's Protection and Indemnity ("P&I") underwriters, who are not parties to this litigation. The remaining $4,000 was borne by Hvide. Even if Petitioners had borne this $4,000 cost, the amount is clearly *de minimis*, if not legally insignificant, when compared to the $70 million claim of Petitioners.

D. Hvide did not Waive Any Defenses at the District Court.

Petitioners label Hvide's defense, that its only liability is pursuant to contract, as a defense of failure to state a claim. Petitioners then conclude that since Hvide did not espouse an *East River* economic loss rule at the District Court, plaintiffs had inadequate notice of the defense, have been prejudiced and thus Hvide must be held to have waived the defense.

From the outset of the litigation Petitioners claimed Hvide breached its supervision contract and negligently performed its professional services. Hvide pleaded a defense of failure to state a claim in its answer and has maintained throughout the litigation that it could not be liable in tort.

Petitioners argue that Hvide's general statement in its answer that the complaint failed to state a claim upon which relief could be granted was insufficient to raise the defense. However, this defense is not waived for failure to assert it in a specific manner. *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984). As long as Hvide raised in the trial court the broad or general defense that the complaint failed to state a claim for which relief could be granted, the issue is properly before

the appellate court. *Crowder v. Lash*, 687 F.2d 996 (7th Cir. 1982).

Even if it is determined that Hvide did not adequately raise the defense in the district court, Hvide is still not barred from raising the issue on appeal since *East River*, the decision which established the defense, was decided subsequent to the trial on the merits. In *Cotton States Mutual Insurance Co. v. Anderson*, 749 F.2d 663 (11th Cir. 1984), the appellate court recognized that the appellee did not raise a particular defense at the trial level, but also recognized that appellee was unable to do so because the decision on which the defense was premised had not yet been issued. The appellate court held that a defense is not waived by failure to raise the issue at trial in such circumstances. 749 F.2d *at* 665.

Finally, prior to the Fifth Circuit's decision in this case, the matter was remanded to the district court for reconsideration in light of *East River*. Petitioners litigated the issue and convinced the district court that *East River* was not applicable. That they were not equally successful on appeal does not provide a basis to claim prejudice.

Even had Hvide not raised the defense at the district court, however, an appellate court may nonetheless consider an issue raised for the first time on appeal where the issue is an issue of law, is central to the

decision at hand or where refusal to consider the issue would result in a manifest injustice. *Escobar Ruiz v. Immigration and Naturalization Service*, 813 F.2d 283 (9th Cir. 1987); *FMC Finance Corp. v. Murphree*, 632 F.2d 413 (5th Cir. 1980). The question presented by Hvide at the Fifth Circuit was a question of law and, Hvide submits, has already been answered by this Court. The question was clearly central to this case and failure to consider the issue would certainly have resulted in manifest injustice.

Petitioners, in asserting that Hvide waived the defense, seek to wave a procedural smoke screen before the well settled principal that a court, including an appellate court, must apply the law as it exists at the time of its decision and not the law as it existed at the time the complaint was filed or the trial held. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974); *Nations v. Sun Oil Co.*, 695 F.2d 933 (5th Cir. 1983) (applying an intervening decision of the Mississippi Supreme court). Where a decision of the United States Supreme Court demonstrates that a ruling on which a judgment depends was in error, a court of appeals is required to correct that ruling. *Crane v. American Standard, Inc.*, 603 F.2d 244 (2d Cir. 1979).

Here, the *East River* decision abolished the cause of action upon which Petitioners' negligence claims are

based. Even had Hvide not previously litigated the existence of these claims, this Court has already established that no such cause of action exists.

CONCLUSION

For the reasons above stated, the decision of the United States Court of Appeals for the Fifth Circuit is consistent with federal maritime law as set forth in the decisions of this Court. No conflict between appellate courts exists on any of the issues raised by Petitioners. The Petition must be denied.

Respectfully submitted,

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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1988

EMPLOYERS INSURANCE OF WAUSAU, ET AL.
Petitioner

versus

AVONDALE SHIPYARDS, INC., ET AL.
Respondents

OCCIDENTAL PETROLEUM CORPORATION, ET AL.
Petitioners

versus

AVONDALE SHIPYARDS, INC., ET AL.
Respondents

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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QUESTIONS PRESENTED

Petitions No. 88-2049 and 88-2052 present similar questions arising from the same case. These questions are:

A. Whether the court of appeals was correct in determining that the holding of this Court in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), precludes a maritime tort action against a party which contracted to supervise the construction of a vessel where petitioners suffered only economic losses resulting from the loss of the vessel.

B. Whether the court of appeals was correct in holding that one of the defendants could assert the defense afforded by *East River*, where (1) that defendant had pled as a defense the failure to state a claim upon which relief can be granted, and (2) the *East River* decision was not rendered until after the decision by the trial court.

C. Whether the court of appeals was correct in interpreting, in light of New York law, a complex shipbuilding contract negotiated between two large commercial entities. In particular, petitioners contest the court of appeals' conclusions:

1. That the Guarantee Deficiency Clause of the particular contract incorporated or subsumed an express warranty of seaworthiness;
2. That the contractual limitations of remedies, including the exclusion of consequential damages and repair or replacement remedy, applied under the circumstances;
3. That the limited remedy provided in the contract did not fail in its essential purpose.

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1 State of New York Law Review Commission Study of the Uniform Commercial Code 584 (1983).....13

STATEMENT OF THE CASE

Petitioners[1] sued to recover their economic losses resulting from the sinking of an integrated catug-barge ("ITB"), the Oxy Producer, as well as economic losses with respect to the Oxy Producer's two sister ships, the Oxy Trader and Oxy Grower. Petitioners sued those involved in the design and construction of the vessels: Avondale Shipyards, Inc. ("Avondale"), the shipyard which constructed the vessels; Ogden Corporation ("Ogden"), the guarantor and former parent of Avondale; J.J. Henry Company, Inc. ("J. J. Henry"), the naval architectural firm involved in the design of the vessels; Victoria Machine Works, Inc. ("Victoria"), a manufacturer of certain components in the vessels; and various entities affiliated with Hvide Shipping, Inc., including Hvide Shipping, Inc. Hvide Marine International, Inc., Seabulk Transmarine I, Inc., and Seabulk Transmarine II, Inc. (collectively referred to as "Hvide"). Hvide was involved with the vessels in several ways. First, it held the patent for the catug integrated tug-barge design. Second, it participated with J. J. Henry in the design of the Oxy Producer and its sister

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[1] Petitioners in No. 88-2052 include various parties affiliated with Occidental Petroleum Corporation, including Suwannee River Lines, Inc., Suwannee River SPA Lines, Inc., Suwannee River Phosphate Lines, Inc., the bareboat charterers of the three Oxy ships, Suwannee River Chartering, Inc., the time charterer of the ships; Occidental Export, Inc., the seller of certain chemicals transported by the ship; Occidental Chemical Agricultural Products, Inc.; and Occidental Petroleum Corp., the parent corporation of all the preceding parties. Also included among the petitioners in No. 88-2052 are the London underwriters subscribing to Certificates No. 14880, 14882, and 14888. Petitioners in No. 88-2049 inculde the American underwriters subscribing to Certificate of Insurance No. 14880.

ships. Third, Hvide was retained by Occidental to supervise the construction of the vessels. Finally, Hvide was charged with manning and operating the Oxy Producer and its sister ships.

After rejecting a conventionally designed vessel, Occidental decided to construct three identical ITB's principally because they were less expensive to operate with their lower manning requirements. After extensive negotiations, Avondale and Occidental executed a lengthy, complex construction contract ("the Contract") for each of the vessels. In the Contracts, Avondale agreed to construct the Oxy Producer and its sister ships in accordance with the Vessel Plans and Specifications. However, the parties also expressly limited the remedies available in the event that the vessels were not completed in accordance with the plans and specifications. Among the limitations were: (1) an exclusion of warranties other than certain designated warranties in the Contract; (2) a limitation of remedy to repair or replacement of deficiencies known as guarantee deficiencies; (3) a separate exclusion of the consequential damages, including damage to the vessel itself; and (4) an express exclusion of all other remedies, whether in contract or tort.

Both the tug and the barge of the Oxy Producer were constructed by Avondale under Hvide's supervision. After successful sea trials, Occidential accepted the Oxy Producer. Thereafter, the Oxy Producer made one successful round trip to the Soviet Union. On its second voyage, however, the vessel encountered extremely rough weather during which the system connecting the tug and the barge was damaged. The captain diverted the vessel to Porta Delgado in the Azores. The Oxy Producer spent several days anchored outside Porta Delgado where repairs to the interconnection system were started. On September 20,

1981, the partially repaired vessel got under way in an attempt to ride out impending storms. Unfortunately, on the same morning, the tug portion of the Oxy Producer sank.

The trial was bifurcated and a bench trial on the issue of liability was held. The trial court found that the cause of the sinking of the Oxy Producer was the improper mating of the tug and barge upon delivery[2] and held that both Avondale and Hvide were liable for the sinking of the tug -- Avondale under its shipbuilding contract, and Hvide under both its supervision contract and under a theory of maritime tort.

The Court of Appeals for the Fifth Circuit affirmed the findings of liability, but modified the trial court's conclusions in several important respects. With respect to Avondale and Ogden, the court of appeals held that plaintiffs' recovery was limited to remedies provided in the Contract. With respect to Hvide, the court of appeals concluded that this Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), precluded imposing maritime tort liability.

The trial court dismissed all claims against defendants Victoria and J. J. Henry. On appeal, the Court of Appeals for the Fifth Circuit affirmed the trial court's conclusion that neither Victoria nor J. J. Henry was responsible for the sinking of the Oxy Producer, but the court of appeals reversed the trial court to the extent that it had dismissed all claims against these defendants. The court of

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[2] Avondale vigorously disagrees with the findings of the trial court and the court of appeals that the cause of the vessel's sinking was due to improper mating upon delivery. However, Avondale does not seek to have this Court review these findings.

appeals concluded that J. J. Henry and Victoria were still potentially liable for the unresolved claims involving the sister ships. The court of appeals' holdings with respect to J. J. Henry and Victoria are not at issue before this Court.

ARGUMENT

I. *THE QUESTIONS PRESENTED DO NOT MERIT REVIEW.*

None of the questions presented by petitioners, especially those relating to respondents Avondale and Ogden, merit this Court's review. The questions relating to Avondale and Ogden relate solely to petitioners' challenges to the court of appeals' interpretation of a lengthy, complex shipbuilding contract negotiated between two large commercial entities. These questions involve no issues of constitutional law, no issues of federal statutory law, or federal maritime law. Neither group of petitioners cites any decision of this Court in their arguments involving Avondale and Ogden. The issues relating to Avondale and Ogden involve only the interpretation of the particular wording of the Contract in light of New York law. The court of appeals was correct in its interpretation of the Contract and its decision is consistent with those of the New York courts. However, regardless of whether the court of appeals was correct on the state law issues, there are no overriding policy concerns in the present case that warrant this Court's review. The case has little implication beyond the determination of the rights and liabilities of the parties.

Petitioners do not articulate any "special and important reasons" to support their argument that this Court should exercise its discretionary power of review. Rule 17 of the Supreme Court of the United States provides that a

review on the writ of certiorari is a matter of judicial discretion and will only be granted "when there are special and important reasons therefor." Respondents recognize that Rule 17 does not fully measure or limit this Court's discretion. However, Rule 17 implies that there must be a substantial federal question presented to warrant the granting of certiorari. The court of appeals' decision is not in conflict with a decision of another federal court of appeals, nor has the court of appeals decided a federal question in a way which conflicts with a state court of last resort. There is also no evidence that the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court" as to warrant an exercise of this Court's power of supervision.

Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 378, 393 (1923)). No such reasons exist in this case. Petitioners are merely dissatisfied with the results below as it effects them as litigants. This Court has stressed that it does not "sit for the benefit of the particular litigants." *Rice,* 349 U.S. at 74.

II. *THE COURT OF APPEALS CORRECTLY DETERMINED THAT EXPRESS WARRANTIES WERE INCLUDED OR "SUBSUMED" WITHIN THE DEFINITION OF GUARANTEE DEFICIENCY CONTAINED IN THE CONTRACT.*

In addition to setting forth Avondale's responsibili-

ty with respect to constructing the Oxy Producer, the Contract contained a number of carefully negotiated provisions that limited the warranties and remedies available to the purchaser, Occidental. The Contract defined "guarantee deficiency" in Article I(a):

> *Guarantee Deficiency.* "Guarantee Deficiency" shall mean any weakness, deficiency, failure, breaking down or deterioration in workmanship or material produced or furnished by the Contractor in performing the Contract Work or any failure of any equipment, machinery or materials produced or furnished by the Contractor or a vendor or subcontractor of the Contractor to function as prescribed in the Vessel Plans and Specifications.

The term "contract work" referred to in the definition of "guarantee deficiency" is defined in Article I(i):

> *Contract Work.* "Contract Work" shall mean all work required to be performed by the Contractor under the Vessel Plans and Specifications in this Construction Contract.

The definition of "guarantee deficiency," particularly with its reference to "contract work," is broadly defined so as to include *any deficiencies* by Avondale in meeting the requirements of the Contract and/or the Vessel Plans and Specifications. Thus, if, as the courts below found, the Vessel Plans and Specifications called for the vessel to be mated in a particular fashion, failure to mate the vessel in such a fashion would come within the definition of "guarantee deficiency." Similarly, if the Vessel Plans and Specifications called for the vessel to be "seaworthy," any failure of the vessel to be "seaworthy," would come within the definition of "guarantee deficiency." In effect, the definition of "guarantee deficiency" is so broadly defined that it incorporates all express representations and war-

ranties made throughout the Contract and the Vessel Plans and Specifications.

After broadly defining the concept of "guarantee deficiency," the Contract in Article XVIII(g) provides:

> THE WARRANTIES AND GUARANTEES SET FORTH IN ARTICLE VIII, RELATING TO SPEED, FUEL CONSUMPTION, SPA CARRYING CAPACITY AND DEADWEIGHT TONNAGE, IN THIS ARTICLE XVIII, RELATING TO ANY GUARANTEE DEFICIENCY AND IN ARTICLE XXXVIII RELATING TO DESIGN RESPONSIBILITY FOR THE BARGE, ARE EXCLUSIVE AND ARE IN LIEU OF ALL IMPLIED WARRANTIES (INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND WORKMANLIKE SERVICES).

This provision has two important ramifications. First, it excludes all implied warranties. Second, it provides that the guarantees and warranties set forth in the three designated articles are the exclusive warranties of the Contract. However, because the term "guarantee deficiency" was broadly defined to incorporate any deficiencies with respect to any express representations made elsewhere in the Contract or in the Vessel Plans and Specifications, Article XVIII(g) does not actually have the effect of excluding express warranties made elsewhere in the Contract. Rather, the effect of this provision is to incorporate or "subsume" within the term "guarantee deficiency" all express warranties or representations made elsewhere in the Contract. What this provision makes clear is exactly what the court of appeals found: If the Contract or Vessel Plans and Specifications imposes a requirement on Avondale, the breach of that obligation must be treated as a guarantee

deficiency, and should not be considered as a totally independent warranty operating free of the other provisions of the Contract. *See* Appendix A at 70a-74a.[3]

After defining "guarantee deficiency," the Contract provides the remedies available in situations where guarantee deficiencies occur. Article XVIII(a) of the Contract provides in part:

> [T]he Contractor shall not be responsible for the cost of correcting any such Guarantee Deficiency to the extent that such Guarantee Deficiency resulted from the Purchaser's specific written direction later found to result in a Guarantee Deficiency . . ., *nor to the extent that it is due to ordinary wear and tear, nor to the extent increased by the negligence or other improper act of the Purchaser or any operator of the Vessel or of any other person than the Contractor or its subcontractors during the Guarantee Period. The liability of the Contractor to the Purchaser under this Construction Contract on account of any such Guarantee Deficiency shall not extend beyond the actual corrective repair or replacement thereof* at customary commercial shipyard or ship repair yard rates including the costs of dockage of the Vessel, if necessary. *The Contractor shall not be liable to the Purchaser for any damage to the Vessel or its equipment or cargo or the property of such Purchaser or for consequential damages of the Purchaser arising out of any Guarantee Deficiency,* except that in the event of any Guarantee

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[3] Petitioners in No. 2049 and Petitioners in No. 2052 filed identical appendices with the same pagination. The Opinion of the court of appeals is reproduced in both appendices at 1a. Citations to this Opinion are in the form "Appendix A at ____."

> Deficiency in any item of machinery or equipment furnished by the Contractor, the Contractor shall be liable not only for the cost of correcting or repairing such Guarantee Deficiency, but also shall be liable for the cost of correcting or repairing the damage to the item of machinery or equipment on the vessel caused by such Guarantee Deficiency.

(Emphasis added).

Article XVIII(a) limits Occidental's remedies in several important respects. First, the provision provides that Avondale is only responsible for the actual corrective repair or replacement of the guarantee deficiency, or the cost of such repairs. Second, the provision provides that Avondale will not be responsible to the extent that any damage to the vessel is increased by the negligence or improper act of any person other than Avondale or its subcontractors. Third, the provision contains an independent exclusion of consequential damages, including "any damage to the Vessel or its equipment or the cargo or the property of such Purchaser."

After carefully limiting the contractual remedies, the Contract in Article XXXVI provides that the remedies set forth in the Contract are exclusive:

> Notwithstanding any other provision of this Construction Contract, the rights and remedies as expressed herein shall be exclusive and in lieu of any other remedies available to Purchaser and to Contractor, whether in contract, tort or otherwise.

In light of the plain language of the Contract, the court of appeals correctly concluded that the warranty of seaworthiness, as well as any other requirement imposed by the Vessel Plans and Specifications, was subsumed

within the definition of guarantee deficiency in the Contract. Appendix A at 70a-73a. The court of appeals was also correct in determining that the remedies provided by the Contract were applicable. Therefore, petitioners' remedy is the right to recover the cost of repair, but not consequential damages or damages for loss of the vessel.

III. *THE LIMITATIONS OF REMEDY WERE FREELY NEGOTIATED.*

One of the central themes underlying this Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), is that as to contracts between large economic entities, the parties should be left to the "benefit of their bargain." That is all that Avondale has sought in the present case and that is all that the court of appeals held.

With respect to the Contract, each party had a motive for allocating the risk as specified therein. Avondale had no prior experience in constructing ITB's and it only had limited control over the Oxy Producer's design. Moreover, the ITB concept had not been tested previously in transoceanic trade; prior ITB's were engaged exclusively in coastwise trade. Therefore, Avondale wanted to assume as little risk as possible. On the other hand, Occidental rejected a conventional vessel and sought the least expensive method of transporting its superphosphoric acid to the Soviet Union. In order to obtain a lower cost for the Oxy Producer, Occidental was willing to absorb a greater portion of the risk vis-a-vis Avondale. The court of appeals recognized this fact:

> In the instant case, Avondale argues that because the design for the Oxy Producer was relatively novel, it was willing to assume only the

> most limited liability for possible defects. The contract reflects this allocation of risks. Occidental agreed that in the event of a guarantee deficiency, Avondale would be liable only for the cost of repairing or replacing the deficiencies. It agreed that Avondale would not be liable for any damage to the vessel, its cargo, or its equipment, arising from such deficiency. We will not disturb the agreed-upon allocation of risks simply because the worst of those risks has materialized.

Appendix A at 83a.[4]

Although the Contract allocated considerable risk to Occidental, this does not mean that Occidental had to, or did, bear this risk by itself. This Court noted in *East River:*

> [W]hen a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. *Losses like these can be insured.*

476 U.S. 871-72 (emphasis added).

Occidental realized, as this Court did in *East River,* that its risks could be insured. It obtained insurance to cover these risks. The primary petitioners in the present case are the underwriters who insured Occidental. The fact

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[4] Quoting a case applying New York law, the court of appeals recognized that: "[t]he rule that the agreed upon risk should not be disturbed is particularly appropriate where, as here, the warranted item is a highly complex, and in some ways experimental piece of equipment." Appendix A at 82a, quoting from *American Electric Power v. Westinghouse Electric Corp.,* 418 F.Supp. 435, 459 (S.D.N.Y. 1976).

that a large commercial entity such as Occidental chose to allocate risk to its insurers rather than to Avondale was totally rational, and this allocation of risk should not be upset by the courts. Thus, the court of appeals was eminently correct in refusing to reallocate the risks among the parties.

IV. *THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE CONTRACT'S REMEDY DID NOT FAIL IN ITS ESSENTIAL PURPOSE.*

Relying on §2-719(2) of the Uniform Commercial Code ("U.C.C."), petitioners argue that the Contract's limited remedy failed in its essential purpose. Petitioners assert that because the sinking of the vessel precludes the possibility of repair, the remedy has failed in its essential purpose and therefore should be disregarded in favor of other remedies provided by the U.C.C.[5] Petitioners' argument does not withstand proper analysis.

The court of appeals recognized that "whether 'circumstances' have caused a remedy to fail depends on whether the contract anticipated and allocated the risk that the exclusive remedy would not cure all defects." Appendix A at 79a, 80a. If the Contract anticipated that the

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[5] Avondale disputes whether the U.C.C. is applicable in the present case. The court of appeals noted that it was not clear whether, under New York law, a vessel construction contract was to be considered a service contract to which the U.C.C. did not apply, or a sales contract to which the U.C.C. applied. *See* Appendix A at 28a n.12 and 75a. In view of this disagreement and uncertainty as to the applicability of the U.C.C., the court of appeals was correct in noting that "[i]t is not clear that parties should be made, simply by force of analogy, to 'accept the legal consequences' of making a contract subject to these particular code provisions." Appendix A at 75a n.53.

exclusive remedy would not cure all defects, §2-719(2) does not apply because that subsection is concerned "with the application of an arrangement to novel circumstances not contemplated by the parties." Appendix A at 80a n.54 (quoting 1 State of New York Law Review Commission, Study of the Uniform Commercial Code 584 (1983)). Thus, in order to determine whether the remedy has failed in its essential purpose, one must resolve the question posed by the court of appeals -- whether the Contract "anticipates that repairs may be impossible." Appendix A at 80a.

The court of appeals properly recognized that circumstances where repairs were impossible "were not beyond the contemplation of the parties." *Id.* at 81a. On this point, the court stated:

> The guarantee deficiency clause thoroughly recognizes the possibility that a deficiency could result in damage to the vessel and its cargo. The risk of such loss is allocated by the express terms of the contract to Occidental.

Id.

The risk of loss is allocated to Occidental by Article XVIII of the Contract, which excludes consequential damages, including damage to the vessel. Under New York law, such a limitation of consequential damages acts as an independent remedy limitation which remains applicable even if a repair or replacement remedy fails. *Computerized Radiological Services, Inc. v. Syntex Corp.*, 595 F.Supp. 1495, 1510 (E.D.N.Y. 1984), *aff'd in part and rev'd in part on other grounds*, 786 F.2d 72 (2d Cir. 1986); *Cayuga Harvester, Inc. v. Allis-Chalmers, Corp.*, 465 N.Y.S.2d 606 (N.Y. App. Div. 1983); *American Electric Power Co. v. Westinghouse Electric Corp.*, 418 F.Supp. 435, 457-58

(S.D.N.Y. 1976); *accord County Asphalt, Inc. v. Lewis Welding & Engineering Corp.*, 323 F.Supp. 1300, 1308-09 (S.D.N.Y. 1970), *aff'd*, 444 F.2d 372 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971) (applying New York and Ohio law). In upholding the independent exclusion of consequential damages, the court of appeals noted that consequential damages in the present case did not result from Avondale's failure or refusal to repair the guarantee deficiencies. Rather, the consequential damages preceded full repair opportunities and rendered actual repair impossible. Appendix A at 78a.

A comparison of the provisions of Articles XI and XVIII further demonstrates that the parties intended to allocate to Occidental the risk of loss of the vessel after delivery. Article XI expressly imposes on Avondale the *pre-delivery risk of loss* of the vessel, while Article XVIII governing guarantee deficiencies expressly *excludes* liability for damage to the vessel.

Two final points are important. First, this is not a case where the remedy of "repair or replacement" fails because the manufacturer refused to make repairs, or made repeated unsuccessful repair attempts. Rather, until the time the tug sank, repairs were possible and there is no evidence that repairs would have been unsuccessful. Second, even if actual repair is no longer possible, the remedy has not failed. As the court of appeals noted, "[t]he Construction Contract would allow recovery of the *cost* of repair." Appendix A at 79a (emphasis in the original). In fact, as the court of appeals recognized, the value or cost of repairs is all that petitioners could have recovered had vessel survived, regardless of the severity of damages. Appendix A at 81a. Therefore, petitioners are left with a remedy that is consistent with risks which the parties contemplated and allocated. In light of what the parties agreed

upon, the remedy is not inadequate and did not fail in its essential purpose.

CONCLUSION

No aspect of the issues relating to Avondale and Ogden merit this Court's review. The questions presented involve the interpretation of a particular contract in light of New York law. Further, and more importantly, the court of appeals was correct in its resolution of these issues.

Whether expressed in terms of "failure to mate the tug and barge properly" or "failure to provide a seaworthy vessel," the cause of the tug's sinking, as found by the court of appeals, fits within the Contract's definition of a "guarantee deficiency." Thus, it is subject to the Contract's limitations of remedies and liabilities.

The Contract's limited remedy did not fail in its essential purpose. Petitioners can still recover the cost of repairs. The Contract's exclusion of consequential damages, including damage to the vessel, operates as an independent provision which allocated the risk of the loss of the vessel to Occidental. Thus, the parties contemplated and allocated the risks. Although some of the greatest risks materialized, this does not justify reallocating risks freely allocated between two large commercial entities.

For the foregoing reasons, Respondents respectfully submit that the Petitions for Certiorari in Docket Nos. 88-2049 and 88-2052 should be denied.

Respectfully submitted,

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APPENDIX: Listing of Parent, Subsidiary and Affiliate Companies of Avondale Shipyards, Inc. and Ogden Corporation in Accordance with Supreme Court Rule 28.1.

Allen & Company

Avondale Industries, Inc.

Avondale Shipyards, Inc.

International Terminal Operating Co., Inc.

Ogden Bulk Systems Company, Inc.

Ogden Catering of Texas, Inc.

Ogden Corporation

Ogden Projects, Inc.

Rototest Laboratories, Inc.

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SEP 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-2049, 88-2052

In the Supreme Court of the United States

OCTOBER TERM 1988

EMPLOYERS INSURANCE OF WAUSAU, ET AL.
Petitioner

v.

AVONDALE SHIPYARDS, INC., ET AL.
Respondent

OCCIDENTAL PETROLEUM CORPORATION, ET AL.
Petitioners

v.

AVONDALE SHIPYARDS, INC., ET AL.
Respondents

PETITIONERS' CONSOLIDATED REPLY BRIEF TO HVIDE'S AND AVONDALE'S OPPOSITIONS TO THE PETITION FOR CERTIORARI

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PETITIONERS' CONSOLIDATED REPLY BRIEF TO HVIDE'S AND AVONDALE'S OPPOSITIONS TO THE PETITION FOR CERTIORARI

Pursuant to Rule 22.5, Petitioners in No. 88-2052, Occidental Petroleum Corporation and the London Underwriters, et al., submit their Reply Brief to address arguments first raised by respondents, Hvide and Avondale, in their Briefs in Opposition to the Petition for Writ of Certiorari.

REPLY TO HVIDE

Hvide's argument that the crew's effects did not constitute "other property" because such effects were "closely associated with the product" and the loss thereof was "incidental to the failure of the product" (p.13, Hvide Brief) has no basis in fact or law. Inasmuch as loss of seismic equipment installed on a vessel subsequent to its construction has been considered to be "other property", surely the crew's effects must be also considered "other property." *Nicor Supply Ships Associates v. General Motors*, 876 F.2d 501 (5th Cir. 1989). Moreover, the *Nicor* panel emphatically stated that the Fifth Circuit's opinions in the instant case and in *Louis Dreyfus Corporation v. 27,946 Long Tons of Corn*, 830 F.2d 1321 (5th Cir. 1987) to the effect that loss of cargo did not constitute "other property" within the meaning of *East River Steamship Corp. v. Transamerica Delaval*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986)

"do not bind us as the law of the circuit." 876 F.2d at 506. Petitioners submit that those decisions are not only non-binding, but, in fact, erroneous.

Hvide further claims that the loss of the crew's property should not be considered "other property", because only a portion of the loss, if any, was paid by petitioners.[1] In fact, petitioners did pay a portion, although not the entire, loss of the crew's effects. However, whether, because of insurance coverage or otherwise, the loss of these effects was only partially paid by petitioners is totally irrelevant in determining whether the crew's effects constitute "other property" within the meaning of the *East River* case. As held in *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925, 928 (5th Cir. 1987), *cert. denied,* 108 S.Ct. 1472 (1988), the determination as to what constitutes "other property" is not based on who paid for its loss but whether the property was "the object of the contract" between the parties. Unquestionably, the crew's effects were purchased and lost by the crew and were not "the object of the contract" between petitioners and Hvide. Consequently, they constitute "other property" within the meaning of *East River*.

REPLY TO AVONDALE

Avondale raises two new issues in its opposition brief: First, Avondale asserts that:

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[1]Because the case was bifurcated, there has been no trial on the damage issues yet. Therefore, no evidence has been introduced regarding the amount of loss or payment thereof.

> ...this is not a case where the remedy of 'repair or replacement' fails because the manufacturer refused to make repairs, or made repeated unsuccessful repair attempts. Rather, until the time the tug sank, repairs were possible and there is no evidence that repairs would have been unsuccessful (p. 14, Avondale Brief).

Second, Avondale suggests that the Uniform Commercial Code (UCC) is not necessarily applicable to a vessel construction contract (p. 12, footnote 5, Avondale Brief).

Avondale's argument that there was no refusal to repair totally ignores the fact that it was notified, prior to the sinking, of the problems encountered by the vessel and sent a representative to investigate the situation (see Telex, attached hereto as Tab "A" for the convenience of the Court). However, rather than providing expert advice and assistance prior to the sinking, which, as the expert ship builder it would have been in a position to render, Avondale disavowed any responsibility under the guarantee deficiency clause. Instead, it merely agreed to assist in expediting "materials for repairs."

It is, indeed, ironic that Avondale, which disavowed any responsibility for repairs under the guarantee deficiency clause, now invokes the very same guarantee deficiency clause to shield itself from liability for its breach of warranty to deliver a seaworthy vessel.

Avondale's further attempt to negate the applicability of the Uniform Commercial Code (UCC) to a vessel construction contract flies in the face of *East River Steamship Corp. v. Transamerica Delaval, Inc., supra,* which squarely held that a vessel construction contract is a sales contract to which the UCC applies. 476 U.S. at 872.

CONCLUSION

The oppositions filed by Hvide and Avondale, rather than militating against the granting of the writ, demonstrate the need for granting it so as to resolve the uncertainties regarding the applicability of *East River* to contracts for professional services and the uncertainties regarding the definition of "other property" within the meaning of *East River*, and finally, to ensure uniform application of the UCC to vessel construction contracts. For these reasons and those stated in the Petition for a Writ of Certiorari, the oppositions filed by Hvide and Avondale should be denied and the Petition for a Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 14th day of September, 1989, served two copies of the foregoing upon counsel of record for all parties to these consolidated proceedings by mailing same by United States mail, properly addressed, and first class postage prepaid.

JAMES B. KEMP JR.

POOR QUALITY ORIGINAL

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: NETWORK(1=TLX,2=TWX,3=DDD,4=PVT)2

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SEPTEMBER 16, 1981
ASI REF 8091621-13

SUWANNEE RIVER FINANCE, INC.
ATTN ADM. T. SHEPARD, JR.

CC BY WIRE:
HVIDE SHIPPING, INC.
ATTN MR. B. SOWREY

ASI JOB CB-777

RE YOUR TELEX 9-15-81 DAMAGE INCURRED OXY PRODUCER PRESENTLY UNDERGOING SURVEY AND REPAIRS SAN MIGUEL, AZORES. THE DAMAGES SUSTAINED ARE CONSIDERED THE RESULT OF HEAVY WEATHER AND NOT COVERED BY THE BUILDER'S GUARANTEE UNDER THE CONSTRUCTION CONTRACT. AS YOU HAVE NOTED, WE HAVE SENT OUR REPRESENTATIVE TO THE VESSEL. OUR PARTICIPATION IN THIS SURVEY AND EFFORTS ON OUR PART TO EXPEDITE MATERIALS FOR REPAIRS IS NOT TO BE CONSTRUED AS ANY ACKNOWLEDGEMENT OF RESPONSIBILITY UNDER THE CONTRACT. FURTHER, WITH THE AVAILABILITY OF BUMPER MATERIALS SUWANNEE MAY BE ABLE TO MAKE PERMANENT REPAIRS. WE WILL CONTINUE TO ASSIST SO THAT REPAIRS CAN BE ACCOMPLISHED IN THE SHORTEST POSSIBLE TIME.

R. P. MERIC, JR.
AVONDALE SHIPYARDS INC

ORIGINTL WSH

ACTION DFG NLN

TIME=16:45:57 DATE=09/16/81

ASI-050759